

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Adoption of Chapter 3-122
Hawaii Administrative Rules

November 7, 1995

SUMMARY

Chapter 3-122, Hawaii Administrative Rules,
entitled "Source Selection and Contract Formation", is
adopted.

HAWAII ADMINISTRATIVE RULES

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DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

SUBTITLE 11

PROCUREMENT POLICY BOARD

CHAPTER 122

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"Descriptive literature" means information available in the ordinary course of business which shows the characteristics, construction, or operation of an item which enables the State to consider whether the item meets its needs.

"Design specifications" means the dimensional and other physical requirements of the item being purchased, how a product is to be fabricated or constructed.

"Discussion" means an exchange of information or other manner of negotiation during which the offeror and the State may alter or otherwise change the conditions, terms, and price of the proposed offer. Discussion may be conducted in connection with request for proposals, sole source, and emergency procurement; discussions are not permissible in competitive sealed bidding, except to the extent permissible in the first phase of multi-step sealed bidding to determine the acceptability of technical offers.

"Final settlement" means the time when the procurement officer publishes notice that the officer has determined and certified to the amount deemed by the officer to be due to or from the contractor after the work called for by the contract is fully completed (although full payment is not then made and the amount may be subject to change), which notice shall be published in a newspaper of general circulation in the State printed and published in Honolulu or in the county in which the work was contracted to be performed.

"Formal bid or proposal" means legally advertised, invitation for bids or request for proposals where the expenditure is \$10,000 or more for goods and services and \$25,000 or more for construction and award is by a formal written contract.

"Opening" means the date set for opening of bids, receipt of unpriced technical offers in multi-step sealed bidding, or receipt of proposals in competitive sealed proposals.

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"Performance specifications" means the functional or performance requirements of the item, what a product does and how well it performs.

"Practicable" and "Advantageous" shall be given ordinary dictionary meanings. "Practicable" means what may be accomplished or put into practical application. "Advantageous" means a judgmental assessment of what is in the State's best interest. The use of competitive sealed bidding may be practicable, that is, reasonably possible, but not necessarily advantageous, that is, in the State's best interest.

"Professional services" means those services within the scope of the practice of architecture, landscape architecture, professional engineering, land surveying, real property appraisal, law, medicine, accounting, dentistry, or any other practice defined as professional pursuant to section 415A-2, HRS, or the professional and scientific occupation series contained in the United States Office of Personnel Management's Qualifications Standards Handbook. A list of professional and scientific positions from the handbook shall be provided by procurement directive.

"Qualified products list" means an approved list of goods, services, or construction items described by model or catalogue numbers, which, prior to competitive solicitation, the State has determined will meet the applicable specification requirement.

"Quotation" means a statement of price, terms of sale, and description of goods, services, or construction offered by a prospective seller to a prospective purchaser, usually for purchases below the amount requiring formal bidding.

"Specification for common or general use item" means a specification which has been developed and approved for repeated use in procurements, as in the case of price list items.

"Specifications" means any description of the physical or functional characteristics, or of the nature of a good, service, or construction item. The term includes descriptions of any requirement for inspecting, testing, or preparing a good, service, or construction item for delivery.

"Standard commercial product" means a product or material, in the normal course of business, is customarily maintained in stock or readily available by a manufacturer, distributor, or dealer for the marketing of the product. [Eff DEC 15 1995]
(Auth: HRS §103D-202) (Imp: HRS §§103D-104, 103D-202)

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SUBCHAPTER 2

GENERAL PROVISIONS

§3-122-2 Extension of time for acceptance of offer received in response to a solicitation. After opening offers, the procurement officer may request offerors to extend the time during which the State may accept their offers, as stated in the terms and conditions of the solicitation, provided that, with regard to competitive sealed bids, no other change is permitted. The reasons for requesting the extension shall be documented. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-3 Extension of time on contracts. (a) If a contract has exhausted its provision for extension(s) of time of performance, or if the contract does not include a provision for extension(s) of time of performance, the contract may be extended upon approval of the chief procurement officer, provided:

- (1) The period of each extension is for one hundred eighty calendar days or less;
- (2) The procurement officer makes a written determination that it is not practical to award another contract at the time of the expiration of the contract for reasons to include but not be limited to the following:
 - (A) A new contract cannot be executed by the time the contract expires; or
 - (B) The need for the good or service is short term;
- (3) All parties agree to the extension of time of performance; and
- (4) The price(s) or conditions of the contract remain the same as the original contract, or as amended per the contract; or if not the same or as amended, they are fair and reasonable.

(b) If paragraph (2) of subsection (a) is met, but paragraph (3) or (4) of subsection (a) or both are not met and the procurement officer determines in writing that the need for the good or service continues, provided subchapters 8, 9, and 10 do not apply, the chief procurement officer, may upon request in writing, approve an alternative procurement method,
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including but not limited to direct negotiations with a party other than the contractor, subject to the maximum one hundred eighty calendar day contract period.

[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-4 Multiple or alternate offers. (a) Unless multiple or alternate offers are specifically provided for, the solicitation shall state that multiple or alternate offers shall not be accepted.

(b) When prohibited, multiple or alternate offers shall be rejected, provided that if an offeror clearly indicates a primary offer, it shall be considered for award as though it were the only offer submitted by the offeror.

(c) This section shall be set forth in the solicitation, and if multiple or alternate offers are allowed, it shall specify their treatment.

[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-5 Procuring state-produced goods or services. Using agency requirements may be fulfilled by procuring goods produced or services performed incident to the State's own programs, such as Ho'opono workshop and correctional industries, pursuant to chapter 3-128. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-6 Conditioning offers upon other awards not acceptable. Any offer which is conditioned upon receiving award of both the particular contract being solicited and another state contract shall be deemed nonresponsive and not acceptable.

[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-7 Determination of contractual terms and conditions. The chief procurement officer or the head of a purchasing agency is authorized to determine the contractual provisions, terms, and conditions of solicitations and contracts, provided the provisions,

terms, and conditions are not contrary to statutory or chapter 91 administrative rule requirements governing

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the procurement. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-8 Purchase of items separately from construction contract. The chief procurement officer or the head of a purchasing agency is authorized to determine whether a good item or group of good items shall be included as part of, or procured separately from, any contract for construction. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-122-9 Use of facsimiles. (a) Copies of documents transmitted by vendors via facsimile machine shall be limited to the notice of intention to offer; the offer; and modifications or withdrawal of offers, pursuant to subsections (b) and (c).

(b) Notices of intention to offer and modifications or withdrawal of an offer may be by facsimile machine pursuant to sections 3-122-108 and 3-122-28, respectively.

(c) An offer transmitted via facsimile machine shall be acceptable only when specifically allowed in the invitation for bids or request for proposals; provided:

- (1) The facsimile offer is received in hand at the designated office by the time and date set for receipt of offers;
- (2) The facsimile offer contains:
 - (A) The identification number of the invitation for bids or request for proposals;
 - (B) The item;
 - (C) The quantity;
 - (D) The price for the offer;
 - (E) All pages of the offer requiring an original signature; and
 - (F) A signed statement that the offeror agrees to all the terms, conditions, and

- provisions of the invitation for bids or request for proposals; and
- (3) The complete original offer with the bond, if required, is received within two working days from the time and date set for receipt of offers. [Eff DEC 15 1995] (Auth: HRS

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§§103D-202, 103D-303, 103D-310) (Imp: HRS
§§103D-302, 103D-303, 103D-310)

SUBCHAPTER 3

SPECIFICATIONS

§3-122-10 Purpose. A specification is the basis for procuring a good, service, or construction item adequate and suitable for the State's needs in a cost effective manner. Purchasing agencies shall seek to procure standard commercial products, if practicable, and obtain the most advantageous prices. All specifications shall seek to promote overall competition, shall not be unduly restrictive, and provide a fair and equal opportunity for every supplier that is able to meet the State's needs. In developing specifications, unique requirements should be avoided. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-401) (Imp: HRS §§103D-401, 103D-405)

§3-122-11 Authority to prepare specifications.
(a) The chief procurement officer, with the assistance of the using agency, shall prepare and approve specifications, and may delegate, in writing, to purchasing or using agencies the authority to prepare and use its own specifications, provided the delegation may be revoked by the chief procurement officer.

- (1) The written delegation shall include a determination made by the chief procurement officer that there will be no substantial conflict of interest involved and it is otherwise in the best interest of the State.

(2) Using agencies delegated the authority to prepare specifications may use any of the specifications defined herein.

(b) If a specification for general or common use item or a qualified products list exists for an item to be procured under subchapter 8, for small purchases, it shall be used. If no specification exists, purchasing agencies are hereby granted the authority to prepare specifications for use in such purchases.

(c) In an emergency under subchapter 10, any necessary specifications may be utilized by the purchasing agency without regard to the provisions of

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this subchapter. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-401) (Imp: HRS §§103D-401, 103D-402)

§3-122-12 Duties of the administrator. (a) The administrator of the state procurement office shall serve as the central procurement officer to coordinate, guide, and distribute specifications used by purchasing agencies, including specifications on recycled products. This effort will allow for the use of standard specifications by purchasing agencies on purchases for common or general use items or standard commercial products.

(b) The administrator of the state procurement office shall review and establish purchase specifications to guide state and county purchasing agencies in the procurement of recycled products.

(1) The specifications shall:

- (A) Be consistent with applicable current federal specification standards on recycled products incorporated in Presidential Executive Orders No. 12873, dated October 20, 1993, and any subsequent amendments to that order;
- (B) Include minimum standards of recovered material and postconsumer content; and
- (C) Ensure, to the maximum extent economically feasible, the purchase of materials which may be recycled or reused when discarded and avoid the

purchase of products deemed environmentally harmful.

- (2) The administrator shall periodically review its specifications to determine whether discrimination against procured goods with recycled content exists and shall revise these specifications to eliminate any discrimination.
- (3) Purchase specifications shall include, but not be limited to, office paper, printed material, paper products, paper, glass-by-products, plastic products, mulch and soil amendments, tires, batteries, oil, paving materials and base, subbase, and pervious backfill materials. Paving materials to be considered shall include, but are not limited to, asphalt, tires, crushed concrete for base, subbase, and paving

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materials. The standards and specifications shall provide for the use of recycled materials and shall not reduce the quality standards for any product or construction. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-401) (Imp: HRS §103D-401)

§3-122-13 Development of specifications. (a) A specification should provide for the following:

- (1) Identify minimum requirements;
- (2) Allow for a competitive bid;
- (3) List reproducible test methods to be used in testing for compliance with specifications; and
- (4) Provide for an equitable award at the lowest possible cost.

(b) Types of specifications include the following, and may be used in combination when developing the specification:

- (1) Design specification sets the requirements for the product, detailing the characteristics that the item must possess, how the item is to be manufactured;
- (2) Performance specifications describes the capabilities that the product must meet, use

- of test or criteria are developed to measure the item's ability to perform as required;
- (3) Brand name specification commonly referred to as restrictive specifications, may be used upon approval of the chief procurement officer after the purchasing agency makes a written determination that only the identified brand name item will satisfy the state's needs, and it is not practicable to use a less restrictive specification;
 - (4) Brand name or equal specification cites one or more brand names, model numbers, or other designations that identify the specific products as having the characteristics of the item desired; and
 - (5) Qualified or pre-approved products list is a list of goods, services, or construction items, which, prior to the opening of the competitive solicitation, are examined, tested, and determined to meet the applicable specification requirements.
- (c) To the extent practicable, the State may

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procure standard commercial products using accepted commercial specifications. Specifications shall emphasize functional or performance criteria which do not discriminate against the use of recycled materials.

(d) The using agency shall submit advice and assistance in the development of specifications or plans pursuant to a request from the purchasing officer.

(e) A contractor or consultant paid for services to develop or prepare specifications or work statements shall be precluded from submitting an offer or receiving a contract for that particular solicitation.

(f) Specifications prepared by architects, engineers, consultants and others for public contracts, shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the State's needs and shall not be unduly restrictive.

[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-401)
(Imp: HRS §§103D-401, 103D-404, 103D-405, 103D-406)

§3-122-14 Exempted items. Purchasing agencies are granted the authority to prepare specifications for goods, services, and construction procured under sections 103D-102 and 103D-304, HRS.
[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-403)
(Imp: HRS §§103D-102, 103D-304, 103D-403)

§3-122-15 (Reserved).

SUBCHAPTER 4

METHODS OF SOURCE SELECTION

§3-122-16 Methods of source selection. Unless authorized by law, all contracts shall be awarded by competitive sealed bidding pursuant to subchapter 5, except as provided in:

- (1) Subchapter 6 - Competitive sealed proposals;
- (2) Subchapter 7 - Professional services procurement;
- (3) Subchapter 8 - Small purchases;
- (4) Subchapter 9 - Sole source procurements; and
- (5) Subchapter 10 - Emergency procurements.

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[Eff DEC 15 1995] (Auth: HRS §103D-202)
(Imp: HRS §103D-301)

SUBCHAPTER 5

COMPETITIVE SEALED BIDDING

§3-122-17 Purpose. The purpose of this subchapter is to provide rules for the use of the competitive sealed bidding method of source selection.
[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-18 Applicability. These rules shall apply to every procurement made by competitive sealed bidding pursuant to chapter 103D, HRS, including single and multi-step sealed bidding. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-19 Dollar thresholds for competitive sealed bids. Expenditures \$10,000 or more for goods and services, or \$25,000 or more for construction shall be made pursuant to this subchapter, except as provided in subchapters 6, 7, 9, and 10. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-20 Conditions for use. (a) Unless otherwise authorized by law, contracts shall be awarded by competitive sealed bidding, except as provided in subchapters 6, 7, 8, 9, and 10.

(b) The competitive sealed bidding method shall not include negotiations with bidders after the receipt and opening of bids. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §§103D-301, 103D-302)

§3-122-21 Preparing a competitive sealed bid. (a) The invitation for bids shall be used to initiate a competitive sealed bid procurement and shall include:

- (1) Instructions and information to bidders concerning the bid submission requirements, including:

(A) The time and date set for receipt of
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bids;

- (B) The address of the office to which bids are to be delivered;
- (C) The maximum time for bid acceptance by the procurement officer issuing the bid; and
- (D) Any other special information, such as any requirement of intention to bid.

The time, date, and location of the receipt of bids and the bid opening shall be the same.

- (2) The purchase description, specifications, evaluation factors, delivery or performance schedule, and inspection and acceptance requirements as are not included in the purchase description.
- (3) The contract terms and conditions, including but not limited to the following, as applicable:
 - (A) Warranty requirement;
 - (B) Bonding or other security requirements pursuant to subchapter 24;
 - (C) Contract extension provisions; and
 - (D) Statement that bid samples or descriptive literature should not be submitted unless expressly requested and that, regardless of any attempt by a bidder to condition the bid, unsolicited bid samples or descriptive literature which are submitted at the bidder's risk will not be examined or tested, and will not be deemed to vary any of the provisions of the invitation for bids.
- (4) A bid form which shall include space for the following, but not limited to the following, and which the bidder shall sign and submit along with all other necessary submissions:
 - (A) Bid price;
 - (B) Brand name and model number and packaging for goods; and
 - (C) Information on applicable preferences.
- (5) Invitation for bids for construction, shall require that the bidder include:
 - (A) The name of each person or firm to be engaged by the bidder as a joint venture, partner or subcontractor in the performance of the contract; and
 - (B) The nature and scope of the work to be

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performed by each.

- (6) Construction bids that do not comply with the requirements in paragraph (5) may be accepted if acceptance is in the best interest of the State and the value of the work to be performed by the joint contractor or

subcontractor is equal to or less than one percent of the total bid amount.

- (7) Documents by reference may be incorporated provided that the invitation for bids specifies where the documents can be obtained.

(b) The invitation for bids may require the acknowledgment of the receipt of all amendments issued. Any amendment issued shall be in the form of an addendum. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-22 Multi-step sealed bidding. (a)

Multi-step sealed bidding is designed to obtain the benefits of competitive sealed bidding by award of a contract to the lowest responsive, responsible bidder, and at the same time obtaining the benefits of the competitive sealed proposals procedure through the solicitation of unpriced technical offers and the conduct of discussions to evaluate and determine the acceptability of technical offers.

(b) Multi-step sealed bidding is a two-phase process consisting of:

- (1) A technical first phase composed of one or more steps in which bidders submit unpriced technical offers to be evaluated by the State based on criteria set forth in the first phase of the invitation for bids; and
- (2) A second phase in which those bidders whose unpriced technical offers are determined to be acceptable based on criteria set forth in the first phase have their priced bids considered and award of a contract is made to the lowest responsive, responsible bidder.

(c) The multi-step sealed bidding method may be used when it is not practical to prepare initially a definitive purchase description which will be suitable to permit an award based on price and it is desirable:

- (1) To invite and evaluate technical offers to determine their acceptability to fulfill the purchase description requirement;

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- (2) To conduct discussions for the purposes of facilitating understanding of the unpriced technical offer and purchase description requirements and, where appropriate, obtain supplemental information, permit amendments of technical offers, or amend the purchase description;
 - (3) To accomplish subparagraphs (1) and (2) prior to soliciting priced bids; and
 - (4) To award the contract to the lowest responsive, responsible bidder in accordance with the competitive sealed bidding procedures.
- (d) A pre-bid conference as contemplated by section 3-122-26 may be conducted by the procurement officer.
- (e) Phase one of multi-step sealed bidding shall be initiated by the issuance of an invitation for bids in the form required by section 3-122-21, except as hereinafter provided, and shall, in addition to the requirements set forth in section 3-122-21, state:
- (1) That unpriced technical offers are requested;
 - (2) Whether priced bids are to be submitted at the same time as unpriced technical offers; if they are, the priced bids shall be submitted in a separately sealed envelope;
 - (3) That it is a multi-step sealed bid procurement, and priced bids will be considered only in the second phase and only from those bidders whose unpriced technical offers are found acceptable in the first phase;
 - (4) That the State, to the extent the procurement officer finds necessary, may conduct oral or written discussions of the unpriced technical offers;
 - (5) That bidders may designate those portions of the unpriced technical offers which contain trade secrets or other proprietary data which are to remain confidential; and
 - (6) That the item being procured shall be furnished generally in accordance with the bidder's unpriced technical offer as found to be finally acceptable and shall meet the requirements of the invitation for bids.
- (f) Addenda to the invitation for bids may, after receipt of unpriced technical offers, be issued and distributed only to bidders who submitted unpriced

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technical offers.

- (1) Those bidders may respond to the amendments in the form of new unpriced technical offers or amendments to the offers submitted.
- (2) If, in the opinion of the procurement officer, a contemplated addendum will significantly change the nature of the procurement, the invitation for bids shall be cancelled in accordance with subchapter 11, and a new invitation for bids issued.
- (g) The unpriced technical offers shall:
 - (1) Not be opened publicly but shall be opened in front of two or more procurement officials;
 - (2) Be subject to nondisclosure of trade secrets and other proprietary data to unauthorized persons, as requested by bidders, in writing.
- (h) The unpriced technical offers submitted by bidders shall be evaluated solely in accordance with the criteria set forth in the invitation for bids. The unpriced technical offers shall be categorized as:
 - (1) Acceptable;
 - (2) Potentially acceptable, that is, reasonably susceptible of being made acceptable; or
 - (3) Unacceptable. The procurement officer shall record in writing the basis for finding an offer unacceptable and make it part of the procurement file.
- (i) The procurement officer may initiate phase two of the procedure if, in the procurement officer's opinion, there are sufficient acceptable unpriced technical offers to assure effective price competition in the second phase without technical discussions. If the procurement officer finds that this is not the case, the procurement officer shall issue an amendment to the invitation for bids or engage in technical discussions set forth in subsection (k).
- (j) The procurement officer may conduct discussions with any bidder who submits an acceptable or potentially acceptable unpriced technical offer, subject to the following rules:
 - (1) During the course of the discussions the procurement officer shall not disclose any information derived from one unpriced technical offer to any other bidder.
 - (2) Once discussions are begun, any bidder who has not been notified that its offer has been

finally found unacceptable may submit supplemental information amending its

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technical offer at any time until the closing date established by the procurement officer. The submission may be made:

- (A) At the request of the procurement officer, or
- (B) Upon the bidder's own initiative.

(k) Upon completion of phase one, the procurement officer shall either:

- (1) Open priced bids submitted in phase one, if priced bids were required to be submitted, from bidders whose unpriced technical offers were found to be acceptable; or
- (2) If priced bids have not been submitted, technical discussions have been held, or amendments to the invitation for bids have been issued, invite each acceptable bidder to submit a priced bid.

(1) Phase two shall be conducted as any other competitive sealed bid procurement except as specifically set forth in this subsection:

- (1) No public notice need be given to phase two, submission of priced bids, because the notice was previously given;
- (2) After the contract is signed by all parties, the unpriced technical offers of all bidders shall be open for public inspection and disclosed as follows:
 - (A) The procurement officer shall examine written request of confidentiality for trade secrets and proprietary data in the technical offer of the bidder to determine the validity of the requests.
 - (B) If the parties do not agree as to the disclosure of data, the procurement officer shall inform the bidder in writing what portions of the unpriced technical offer will be disclosed and that, unless the bidder protests under chapter 3-126, the offer will be so disclosed.

(C) If the parties agree to the disclosure, the unpriced technical offers shall be open to public inspection subject to any continuing prohibition on the disclosure of confidential data; and

(m) Mistakes may be corrected or bids may be withdrawn at any time during phase one, provided, during phase two, mistakes may be corrected or

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withdrawal permitted only in accordance with sections 3-122-28 and 3-122-31. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-302) (Imp: HRS §103D-302)

§3-122-23 Bidding time. (a) A minimum of ten calendar days shall be provided between date of the last legal advertisement of the solicitation and the time and date set for receipt of bids.

(b) Bidders shall have a reasonable time to prepare their bids. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-302) (Imp: HRS §103D-302)

§3-122-24 Public notice. (a) Public notice of the solicitation shall be made for the purpose of securing competition.

(b) The public notice of the solicitation shall include the following information:

- (1) A brief description of the good, service, or construction desired;
- (2) Where and when the solicitation will be available;
- (3) How long the solicitation will be available, i.e., the deadline for the responses to the solicitation;
- (4) Other appropriate information, as the payment of a fee or a deposit to receive solicitation and related documents; and
- (5) For a multi-step sealed bid, a description of each step to be used in soliciting, evaluating, and selecting unpriced bids.

(c) The public notice of availability of the solicitation shall be publicized as follows:

- (1) At a minimum, a one-time legal advertisement published either in a newspaper of general circulation within the State or in a newspaper of local circulation in the county, if available, pertinent to the procurement;
- (2) Optionally, and in addition to (1) above, the following may be utilized:
 - (A) Notice by mail to persons on any applicable bidders mailing list, if any;
 - (B) Publication by any public or private telecommunication information network; or
 - (C) Any other method of publication the procurement officer deems effective.

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(d) A copy of the solicitation shall be made available for public inspection at the office of the procurement officer issuing the solicitation.
[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-302)
(Imp: HRS §103D-302)

§3-122-25 Bidders lists. (a) Bidders lists may be compiled to provide the procurement officer with the names of businesses that may be interested in competing for various types of contracts.

(b) Unless otherwise provided, inclusion of the name of a business is discretionary and does not indicate whether the business is responsible in respect to a particular procurement or otherwise capable of successfully performing a contract; nor does it guarantee notification of each solicitation.

(c) Businesses that fail to respond to invitations for bids or notices of availability may be removed from the applicable bidders list.

(d) Names and addresses on bidders lists shall be available for public inspection. [Eff DEC 15 1995]
(Auth: HRS §§103D-202, 103D-302) (Imp: HRS §103D-302)

§3-122-26 Pre-bid conferences. Pre-bid conferences may be conducted to explain the procurement requirements.

- (1) Pre-bid conferences shall be announced to all prospective bidders in the solicitation or if

- decision to hold a pre-bid conference is made after the issuance of the solicitation, the conference shall be announced in an addendum.
- (2) The conference should be held long enough after the solicitation has been issued to allow bidders to become familiar with it, but sufficiently before bid opening to allow consideration of the conference results in preparing their bids.
 - (3) Nothing stated at the pre-bid conference shall change the solicitation unless a change is made by written addendum as provided in section 3-122-27.
 - (4) A summary of the conference shall be supplied to all those prospective bidders known to have received a solicitation, in addition to any addendum issued as a result of the

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conference. [Eff DEC 15 1995] (Auth:
HRS §103D-202) (Imp: HRS §103D-302)

§3-122-27 Amendments to invitations for bids.

- (a) Amendments to invitations for bids shall be identified as addenda and shall reference the portions of the invitation for bids it amends and detail the amendments.
 - (b) Addenda may be used to:
 - (1) Make any changes in the invitation for bids as in quantity, purchase descriptions, delivery schedules, and opening dates;
 - (2) Correct defects or ambiguities;
 - (3) Furnish to other bidders information given to one bidder if the information will assist the other bidders in submitting bids or if the lack of the information would prejudice the other bidders; and
 - (4) Provide any other information or clarification to the invitation for bids that will result in fair competition.
 - (c) Addenda may require that bidder acknowledge receipt of the addendum issued.
 - (d) Addenda shall be issued to all prospective bidders known to have received an invitation for bids.

(e) Addenda shall be distributed within a reasonable time to allow prospective bidders to consider them in preparing their bids; however, if the time and date set for receipt of bids will not permit adequate time for preparation, the time shall be increased to the extent possible in the addendum or, if necessary, by fax or telephone and confirmed in the addendum. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-28 Pre-opening modification or withdrawal of bids. Bids may be modified or withdrawn prior to the deadline for submittal of bids by the following documents:

- (1) Modification of bids:
 - (A) A written notice accompanying the actual modification received in the office designated in the solicitation, stating that a modification to the bid is submitted; or
 - (B) A written notice accompanying the actual

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modification by facsimile machine pursuant to section 3-122-9 to the office designated in the solicitation; provided bidder submits the actual written notice and modification within two working days of receipt of the facsimile.

- (2) Withdrawal of bids:
 - (A) A written notice received in the office designated in the solicitation; or
 - (B) A notice by facsimile machine pursuant to section 3-122-9, to the office designated in the solicitation.
- (3) The documents shall be made a part of the appropriate procurement file.
[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-29 Late bids, late withdrawals, and late modifications. Any notice of withdrawal, notice of

modification of a bid with the actual modification, or any bid received at the place designated for receipt and opening of a bid after the time and date set for receipt and opening is late.

- (1) A late bid, late modification, or late withdrawal shall not be considered late if received before contract award and would have been timely but for the action or inaction of personnel within the procurement activity.
- (2) A late bid or late modification that will not be considered for award shall be returned to the bidder unopened as soon as practicable and accompanied by a letter from the procurement activity stating the reason for

recorded at the time of opening; that is, the bids shall be tabulated or a bid abstract made.

- (2) The name(s) and address(es) of the required witnesses shall also be recorded at the opening.

(c) The opened bids shall be available for public inspection at the time of opening except to the extent that the bidder designates trade secrets or other proprietary data to be confidential as set forth in subsection (d).

- (1) The material so designated as confidential shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid.
- (2) The prices, makes and models, or catalogue numbers of items offered, deliveries, and terms of payment shall be publicly available at the time of opening regardless of any designation to the contrary.

(d) The procurement officer, or his designated representative, shall examine the bids to determine the validity of any requests for nondisclosure of trade secrets and other proprietary data identified in writing.

- (1) If the parties do not agree as to the disclosure of data, the procurement officer or his designated representative shall inform the bidders present at the opening that the material designated for nondisclosure shall be subject to written determination by the

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respective attorney general or corporation counsel for confidentiality.

- (2) If the attorney general or corporation counsel determines in writing that the material so designated as confidential is subject to disclosure, the bidder submitting the material under review and other bidders who were present at the opening shall be so notified in writing and the material shall be open to public inspection unless the bidder protests under chapter 3-126.

(e) The bids shall be open to public inspection subject to any continuing prohibition on the disclosure of confidential data.

(f) When a purchasing agency denies a person access to a state procurement record, the person may appeal the denial to the office of information practices in accordance with section 92F-42(12), HRS.

(g) Bids shall be unconditionally accepted without alteration or correction, except as allowed in sections 3-122-29 and 3-122-31. [Eff DEC 15 1995]
(Auth: HRS §§92F-42, 103D-202) (Imp: HRS §§92F-42, 103D-302)

§3-122-31 Mistakes in bids. (a) Correction or withdrawal of a bid because of an obvious mistake in the bid is permissible to the extent it is not contrary to the best interest of the government agency or to the fair treatment of other bidders.

(b) A bidder may remedy a mistake in a bid discovered before the time and date set for opening by withdrawing or correcting the bid as provided in section 3-122-28.

(c) Corrections to bids after opening but prior to award may be made under the following conditions:

- (1) If the mistake is attributable to an arithmetical error, the procurement officer shall so correct the mistake. In case of error in extension of bid price, unit price shall govern.
- (2) If the mistake is a minor informality which shall not affect price, quantity, quality, delivery, or contractual conditions, the procurement officer may waive the informalities or allow the bidder to request correction by submitting proof of evidentiary value which demonstrates that a mistake was

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made. The procurement officer shall prepare a written approval or denial in response to this request. Examples of mistakes include:

- (A) Typographical errors;
- (B) Transposition errors;
- (C) Failure of a bidder to sign the bid, but only if the unsigned bid is accompanied

by other material indicating the bidder's intent to be bound.

- (3) If the mistake is not allowable under paragraphs (1) and (2), but is an obvious mistake that if allowed to be corrected or waived is in the best interest of the government agency or for the fair treatment of other bidders, and the chief procurement officer or the head of the purchasing agency concurs with this determination, the procurement officer shall correct or waive the mistake.

(d) Withdrawal of bids after opening but prior to award may be made if the mistake is attributable to an obvious error which shall affect price, quantity, quality, delivery, or contractual conditions, provided:

- (1) The bidder requests withdrawal by submitting proof of evidentiary value which demonstrates that a mistake was made; and
- (2) The procurement officer prepares a written approval in response to this request.

If the response to the request is a denial, the procurement officer shall notify the bidder in writing.

(e) Correction or withdrawal of bids after award is not permissible except when the chief procurement officer or head of the purchasing agency makes a written determination that it would be unreasonable not to allow the mistake to be remedied or withdrawn.

[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-302)
(Imp: HRS §103D-302)

§3-122-32 Cancellation of solicitations and rejection of bids. Cancellation and rejection of bids shall be pursuant to subchapter 11.

[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-33 Bid evaluation and award. (a) The award shall be made to the lowest responsible and
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responsive, responsible bidder and shall be based on the criteria set forth in the invitation for bids.

(b) Only objectively measurable criteria which are set forth in the invitation for bids shall be applied in determining the lowest bidder. Examples of those criteria include but are not limited to:

- (1) Discounts;
- (2) Transportation costs; and
- (3) Total or life cycle costs.

(c) Evaluation factors need not be precise predictors or actual future costs, but to the extent possible the evaluation factors shall:

- (1) Be reasonable estimates based upon information the government jurisdiction has available concerning future use; and

- (2) Treat all bids equitably.

(d) No criteria may be used in bid evaluation that are not set forth in the invitation for bids.

(e) The invitation for bids shall set forth any evaluation criterion to be used in determining product acceptability:

- (1) The solicitation may require the submission of samples, descriptive literature, technical data, or other material to verify product acceptability.

- (2) The solicitation may also provide for accomplishing any of the following prior to award:

(A) Inspection or testing of a product for characteristics as quality or workmanship;

(B) Examination of elements as appearance, finish, taste, or feel; or

(C) Other examinations to determine whether the product conforms with any other purchase description requirements.

- (3) The acceptability evaluation is not conducted for the purpose of determining whether one bidder's item is superior to another but only to determine that a bidder's offer is acceptable as set forth in the invitation for bids.

- (4) Any bidder's offering which does not meet the acceptability requirements shall be rejected as nonresponsive.

(f) Nothing in this section shall permit contract award to a bidder submitting a higher quality item than that designated in the invitation for bids if the

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bidder is not also the lowest bidder as determined under this section.

(g) The contract shall be awarded with reasonable promptness by written notice to the lowest responsive, responsible bidder whose bid meets the requirements and criteria set forth in the invitation for bids.

(h) In the event all bids exceed available funds as certified by the appropriate fiscal officer, the head of the purchasing agency responsible for the procurement in question is authorized in situations where time or economic considerations preclude resolicitation of work of a reduced scope, to negotiate an adjustment of the bid price, including changes in the bid requirements, with the low responsive, responsible bidder, in order to bring the bid within the amount of available funds. If only one responsive bid was received the provisions of subsection 3-122-35(a) shall apply. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-302)

§3-122-34 Low tie bids. (a) Low tie bids are bids from responsive, responsible bidders that are identical in price and which meet all the requirements and criteria set forth in the invitation for bids.

(b) At the discretion of the procurement officer, award shall be made in any permissible manner that will resolve tie bids, including but not limited to:

- (1) Award the contract to a business providing goods produced or manufactured in this State or to a business that otherwise maintains a place of business in this State; and
- (2) Award the contract to the bidder offering a low tie bid who received the previous award, and continue to award succeeding contracts to the same bidder so long as all low bids are identical.

(c) If no permissible method will be effective in resolving tie bids and a written determination is made so stating, award may be made by drawing lots.

(d) Records shall be made of all invitations for bids on which tie bids are received showing at least the following information and shall be made a part of the procurement file:

- (1) The identification number of the invitation for bids;
- (2) The good, service, or construction item; and
- (3) A listing of all the bidders and the prices

submitted. [Eff DEC 15 1995] (Auth: HRS
§103D-202) (Imp: HRS §103D-302)

§3-122-35 Waiver to competitive sealed bid
process. (a) If only one responsive bid is received
in response to an invitation for bids, including
multi-step bidding:

- (1) An award may be made to the single bidder:
 - (A) If the procurement officer finds that
the price submitted is fair and
the prospect is

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- (2) In the event of this determination, a more cost effective alternative procurement method may be selected to include, but not be limited to, direct negotiations.

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(c) Documentation of the alternative procurement method selected shall:

- (1) State the reasons for selection and length of contract period;
 - (2) State why the provisions of subchapters 8, 9, and 10 do not apply;
 - (3) Receive prior approval of the chief procurement officer or a designee; and
 - (4) Be made a part of the contract file upon award by the procurement officer.
- [Eff DEC 15 1995] (Auth: HRS §103D-202)
(Imp: HRS §103D-302)

§§3-122-36 to 3-122-40 (Reserved).

SUBCHAPTER 6

COMPETITIVE SEALED PROPOSALS

§3-122-41 Purpose. The purpose of this subchapter is to provide rules for the use of the competitive sealed proposal method of source selection when it is determined that competitive sealed bidding is neither practicable nor advantageous to the State.
[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-42 Dollar thresholds for competitive sealed proposals. Expenditures \$10,000 or more for goods and services, or \$25,000 or more for construction shall be made pursuant to this subchapter except as provided in subchapters 5, 7, 8, 9, and 10.
[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-43 When competitive sealed bidding is not practicable. Competitive sealed bidding is not practicable unless the nature of the procurement permits award to a low bidder who agrees by its bid to perform without condition or reservation in accordance with the purchase description, delivery or performance schedule, and all other terms and conditions of the invitation for bids. Factors to be considered in

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determining whether competitive sealed bidding is not practicable include:

- (1) Whether the primary consideration in determining award may not be price;
- (2) Whether the contract needs to be other than a fixed-price type;
- (3) Whether the conditions of the goods, services or delivery conditions are unable to be sufficiently described in the invitation for bids;
- (4) Whether oral or written discussions may need to be conducted with offerors concerning technical and price aspects of their proposals;
- (5) Whether offerors may need to be afforded the opportunity to revise their proposals, including price; and
- (6) Whether award may need to be based upon a comparative evaluation as stated in the request for proposals of differing price, quality, and contractual factors in order to determine the most advantageous offering to the State. Quality factors include technical and performance capability and the content of the technical proposal.

[Eff DEC 15 1995] (Auth: HRS §103D-202)
(Imp: HRS §103D-303)

§3-122-44 When competitive sealed bidding is not advantageous. A determination may be made to use competitive sealed proposals if it is determined that it is not advantageous to the State, even though practicable, to use competitive sealed bidding.

Factors to be considered in determining whether competitive sealed bidding is not advantageous include:

- (1) If prior procurements indicate that competitive sealed proposals may result in more beneficial contracts for the State; and
- (2) Whether the factors listed in subsections 3-122-43(4) through 3-122-43(6) are desirable in conducting a procurement rather than necessary; if they are, then the factors may be used to support a determination that competitive sealed bidding is not advantageous. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

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§3-122-45 Determinations. (a) Pursuant to subsection 103D-303(a), HRS, the procurement policy board may approve a list of specified types of goods, services, or construction that may be procured by competitive sealed proposals without a determination by the head of the purchasing agency. The list of specified types of goods, services, or construction when attached to the end of this chapter shall be reviewed biennially for changes.

Although the good, service, or construction is listed, purchasing agencies may use section 103D-302, HRS, competitive sealed bidding.

(b) If the procurement is not listed pursuant to subsection (a), the head of a purchasing agency shall then determine in writing that competitive sealed proposals is a more appropriate method of contracting in that competitive sealed bidding is neither practicable nor advantageous.

- (1) The determinations may be made for specified types of goods, services, or construction rather than by individual procurement.
- (2) Procurement of the types of goods, services, or construction so designated may then be made by competitive sealed proposals without making the determination that competitive sealed proposals is a more appropriate method of contracting.

(c) When it is determined that it is more practicable or advantageous to the State to procure construction by competitive sealed proposals:

- (1) A procurement officer may issue a request for proposals requesting the submission of proposals to provide construction in accordance with a design provided by the offeror; and
- (2) The request for proposals shall require that each proposal submitted contain a single price that includes both design and build.

(d) The head of the purchasing agency who made the determination may modify or revoke it at any time and the determination shall be reviewed for current applicability biennially or on the next procurement for these types of goods, services, or construction, whichever occurs later. The head of the purchasing agency may also request that the procurement of the specified types of goods, services, or construction by competitive sealed proposal be added to or deleted from the list in subsection (a). [Eff DEC 15 1995]

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(Auth: HRS §§103D-202, 103D-303) (Imp: HRS §103D-303)

§3-122-46 Preparing a request for proposals. (a)

The request for proposals is used to initiate a competitive sealed proposal procurement and shall include:

- (1) The specifications for the goods, services, or construction items to be procured;
- (2) All contractual terms and conditions applicable to the procurement;
- (3) A statement as to when and in what manner prices are to be submitted;
- (4) A statement concerning whether the proposal shall be accompanied by a proposal security pursuant to subchapter 24 or other evidence of financial responsibility;
- (5) The term of the contract and conditions of renewal or extension, if any;
- (6) Instructions and information to offerors, including pre-proposal conferences, the

- location where proposals are to be received, and the date, time and place where proposals are to be received and reviewed;
- (7) Proposal preparation time shall be set to provide offerors a reasonable time to prepare their proposals. A minimum of thirty calendar days between the date of last legal advertisement of the solicitation and the time and date set for receipt of proposals, unless a shorter time is deemed appropriate for a particular procurement that will allow for adequate competition as determined in writing by the procurement officer;
 - (8) The request for proposals shall:
 - (A) Define the performance or benefit required; and
 - (B) Set forth specific evaluation criteria to be used in evaluation of proposals which may include but is not limited to:
 - (i) Technical capability and approach for meeting performance requirements;
 - (ii) Competitiveness and reasonableness of price; and
 - (iii) Managerial capabilities.
 - (9) A statement that discussions may be conducted

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with offerors who submit proposals determined to be reasonably susceptible of being selected for award, but that proposals may be accepted without discussions; and

- (10) A notice that the request for proposals may be canceled and that any and all proposals may be rejected in whole or in part when it is in the best interest of the State.
 - (b) Public notice for goods, non-professional services, and construction shall be given by a purchasing agency with delegated procurement authority by distributing the request for proposals in the same manner provided for distributing an invitation for bids under section 3-122-24. Public notices for professional services shall be in accordance with section 3-122-64.

(c) Pre-proposal conferences may be conducted in accordance with section 3-122-26.
[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-47 Multi-step sealed proposals. When it is considered impractical to initially prepare a definitive purchase description to support an award based on listed selection criteria, the procurement officer may issue an expression of interest pursuant to section 3-122-24 requesting the submission of unpriced technical offers, and then later issue a request for proposals. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-303) (Imp: HRS §103D-303)

§3-122-48 Amendments to request for proposals. Amendments to requests for proposals may be made by addenda in accordance with section 3-122-27 prior to submission of proposals. After submission of proposals, amendments may be made in accordance with section 3-122-22(g). [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-49 Modification or withdrawal of proposals. Proposals may be modified or withdrawn prior to the established due date in accordance with section 3-122-28. For the purposes of this section and section 3-122-29, the established due date is either the time and date announced for receipt of proposals or §3-122-49

receipt of modifications to proposals, if any; or if discussions have begun, it is the time and date by which best and final offers must be submitted, provided that only priority listed offerors may submit best and final offers. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-50 Late proposals, late withdrawals, and late modifications. Any proposal, withdrawal request, or modification received after the established due date as defined in section 3-122-49 at the place designated

for receipt of proposals is late. They may only be considered in accordance with section 3-122-29.
[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-51 Receipt and registration of proposals.

(a) Proposals and modifications shall be time-stamped upon receipt and held in a secure place by the procurement officer until the established due date. Purchasing agencies may use other methods of receipt when approved by the chief procurement officer.

(1) Proposals and modifications shall not be opened publicly, but shall be opened in the presence of two or more procurement officials.

(2) Proposals and modifications shall be shown only to State personnel having legitimate interest in them.

(b) After the date established for receipt of proposals, a register of proposals shall be prepared which shall include for all proposals:

(1) The name of each offeror;

(2) The number of modifications received, if any; and

(3) A description sufficient to identify the good, service, or construction item offered.

(c) The register of proposals shall be open to public inspection only after award of the contract.

(d) An offeror shall request in writing nondisclosure of designated trade secrets or other proprietary data to be confidential. The data shall accompany the proposal and shall be readily separable from the proposal in order to facilitate eventual public inspection of the nonconfidential portion of the proposal.

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(e) Proposals shall be open to public inspection as provided in section 3-122-58 after the contract is signed by all parties. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-303) (Imp: HRS §103D-303)

§3-122-52 Evaluation of proposals. (a) The procurement officer, or an evaluation committee selected by the procurement officer shall evaluate proposals.

(b) Numerical rating systems may be used, but are not required. When used, the evaluation shall be based only on the evaluation factors set out in the request for proposals. The relative priority to be applied to each evaluation factor shall also be set out in the request for proposals. If numerical rating systems are not used, the procurement officer, or each member of the evaluation committee, as applicable, shall explain his or her ranking determination in writing. Evaluation factors not specified in the request for proposals may not be considered.

(c) When applicable, cost shall be an evaluation factor.

(d) The proposal with the lowest cost factor must receive the highest available rating allocated to cost. Each proposal that has a higher cost factor than the lowest must have a lower rating for cost. If a numerical rating system is used to evaluate the cost factor, the points allocated to higher-priced proposals must be equal to the lowest proposal price multiplied by the maximum points available for price, divided by the higher proposal price.

(e) An evaluation factor must be included which takes into consideration whether an offeror qualifies for any procurement preferences pursuant to chapter 3-124.

(f) A proposal from a debarred or suspended offeror shall be rejected.

(g) Evaluation meetings may be held by an evaluation committee to discuss the request for proposals, the evaluation process, the weighing of evaluation factors, and proposals received, before evaluation.

(h) Evaluations may not be based on discrimination due to the race, religion, color, national origin, sex, age, marital status, pregnancy, parenthood, handicap, or political affiliation of the

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offeror. [Eff DEC 15 1995] (Auth: HRS §103D-202)

§3-122-53 Discussions with offerors. (a) Before conducting discussions, a "priority list" shall be generated by the procurement officer or evaluation committee.

- (1) In order to generate a priority list, proposals shall be classified initially as acceptable, potentially acceptable, or unacceptable.
- (2) All responsive, responsible offerors who submit acceptable or potentially acceptable proposals are eligible for the priority list.
- (3) If numerous acceptable and potentially acceptable proposals have been submitted, the procurement officer or the evaluation committee may rank the proposals and limit the priority list to at least three responsive, responsible offerors who submitted the highest-ranked proposals.
- (4) Those responsive, responsible offerors who are selected for the priority list are referred to as the "priority-listed offerors."

(b) Discussions will be limited to only "priority-listed offerors" and are held to:

- (1) Promote understanding of a state agency's requirements and priority-listed offerors' proposals; and
- (2) Facilitate arriving at a contract that will be most advantageous to the State, taking into consideration the evaluation factors set forth in the request for proposals.

The procurement officer shall establish procedures and schedules for conducting discussions and keep a record of the date, place, purpose of meetings and those attending.

(c) Proposals may be accepted on evaluation without discussion.

(d) Priority-listed offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals.

- (1) Any substantial oral clarification of a proposal shall be reduced to writing by the priority-listed offeror.
- (2) If during discussions there is a need for any

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substantial clarification or change in the request for proposal, the request for proposal shall be amended by an addendum to incorporate the clarification or change.

(e) Addenda to the request for proposals shall be distributed only to priority-listed offerors.

(1) The priority-listed offerors shall be permitted to submit new proposals or to amend those submitted.

(2) If in the opinion of the procurement officer or the evaluation committee, a contemplated amendment will significantly change the nature of the procurement, the request for proposals shall be canceled and a new request for proposals issued.

(f) The contents of any proposal shall not be disclosed so as to be available to competing offerors during the discussion and negotiation process.

[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-54 Best and final offers. (a) The procurement officer shall establish a date and time for the priority-listed offerors to submit their best and final offers.

(b) Best and final offers shall be submitted only once; unless,

(1) The chief procurement officer or the head of a purchasing agency or a designee of either officer above the level of procurement officer determines in writing that it is in the State's best interest to conduct additional discussions or change the State's requirements and require another submission of best and final offers; otherwise,

(2) No discussion of or changes in the best and final offers shall be allowed prior to award.

(c) Priority-listed offerors shall also be informed that if they do not submit a notice of withdrawal or another best and final offer, their immediate previous offer will be construed as their best and final offer.

(d) After best and final offers are received, final evaluations will be conducted for an award pursuant to section 3-122-57. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-55 Mistakes in proposals. (a) Proposals may be modified or withdrawn as provided in section 3-122-53.

(b) Mistakes shall not be corrected after award of contract.

(c) Mistakes discovered before award of the contract:

- (1) When the procurement officer knows or has reason to conclude before award that a mistake has been made, the procurement officer should request the offeror to confirm the proposal. If the offeror alleges mistake, the proposal may be corrected or withdrawn pursuant to this section.
- (2) Once discussions are commenced or after best and final offers are requested, any priority-listed offeror may freely correct any mistake by modifying or withdrawing the proposal until the time and date set for receipt of best and final offers.
- (3) If discussions are not held, or if the best and final offers upon which award will be made have been received, mistakes shall be corrected to the intended correct offer whenever the mistake and the intended correct offer are clearly evident on the face of the proposal, in which event the proposal may not be withdrawn.
- (4) If discussions are not held, or if the best and final offers upon which award will be made have been received, an offeror alleging a material mistake of fact which makes a proposal nonresponsive may be permitted to withdraw the proposal if:
 - (A) The mistake is clearly evident on the face of the proposal but the intended correct offer is not; or
 - (B) The offeror submits evidence which clearly and convincingly demonstrates that a mistake was made.

(d) Technical irregularities are matters of form rather than substance evident from the proposal document, or insignificant mistakes that can be waived

or corrected without prejudice to other offerors; that is, when there is no effect on price, quality, or quantity.

If discussions are not held or if best and final offers upon which award will be made have been

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received, the procurement officer may waive technical irregularities or allow an offeror to correct them if either is in the best interest of the State. Examples include the failure of an offeror to:

- (1) Return the number of signed proposals required by the request for proposal;
- (2) Sign the proposal, but only if the unsigned proposal is accompanied by other material indicating the offeror's intent to be bound; or
- (3) Acknowledge receipt of an amendment to the request for proposal, but only if it is clear from the proposal that the offeror received the amendment and intended to be bound by its terms; or the amendment involved had no effect on price, quality or quantity.

(e) When a proposal is corrected or withdrawn, or correction or withdrawal is denied under this section, the procurement officer shall prepare a written determination showing that the relief was granted or denied in accordance with this section.

[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-56 Cancellation of solicitations and rejection of proposals. Cancellation and rejection of proposals shall be pursuant to subchapter 11.

[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

§3-122-57 Award of contract. (a) The procurement officer shall award a contract under competitive sealed proposals to the responsive, responsible offeror whose proposal is determined in writing to be the most advantageous to the State taking into consideration price and the evaluation factors set out in the request for proposals. Other factors and criteria may not be

used in the evaluation. The contract file must contain the basis on which the award is made.

(b) Pursuant to subchapter 15, cost or pricing data shall be submitted to the procurement officer by the vendor for any contract expected to exceed \$100,000. This requirement may be waived only under the provisions of section 3-122-124.

[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-303)

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§3-122-58 Public inspection. (a) After the contract is signed by all parties, the proposal, except those portions for which an offeror has made a written request for confidentiality, shall be open to public inspection.

(b) The contract file, including but not limited to the following, shall be opened for public inspection:

- (1) The register of proposals prepared pursuant to section 3-122-52;
- (2) A listing of all vendors to whom copies of the request for proposals were distributed;
- (3) Name of successful offeror and dollar amount of offer;
- (4) The basis on which the award was made;
- (5) A copy of the request for proposals;
- (6) A copy of the successful offeror's proposal; and
- (7) A copy of the unsuccessful offeror's proposal.

(c) If a person requests disclosure of data, for which an offeror has made a written request for confidentiality, the head of the purchasing agency or a designee shall consult with the attorney general or corporation counsel and make a written determination in accordance with chapter 92F, HRS.

(d) When a purchasing agency denies a person access to a state procurement record, the person may appeal the denial to the office of information practices in accordance with section 92F-42(12), HRS. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §§92F-42, 103D-303)

§3-122-59 Waiver to competitive sealed proposal process. (a) If only one responsive proposal is received in response to a request for proposals, including multi-step sealed proposals:

- (1) An award may be made to the single offerer, provided the procurement officer finds that:
 - (A) The price submitted is fair and reasonable; and
 - (B) Other prospective offerors had reasonable opportunity to respond; or there is not adequate time for resolicitation.
- (2) The offer may be rejected pursuant to subchapter 11 and new requests for proposals

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may be solicited if the conditions in subparagraphs (A) and (B) are not met.

- (3) The proposed procurement may be cancelled.
- (4) An alternative procurement method may be conducted to include, but not be limited to, direct negotiations, if the procurement officer determines in writing that the need for the good or service continues, but that the price of the one offer is not fair and reasonable and there is no time for resolicitation, or resolicitation would likely be futile.

(b) If no proposals are received in response to a request for proposals, the procurement officer may determine that for a given request it is neither practicable nor advantageous for the State to procure a good or service by again soliciting competitive sealed proposals.

- (1) When making this determination, consideration shall be given to the competition in the marketplace and whether the additional potential cost of preparing, soliciting and evaluating competitive sealed proposals is expected to exceed the benefits normally associated with the solicitations; and
- (2) In the event of this determination, a more cost effective procurement method may be selected, to include but not be limited to, direct negotiations.

(c) Documentation of the alternative procurement method selected shall:

- (1) State the reasons for selection and length of contract period;
 - (2) State why the provisions of subchapters 8, 9, and 10 do not apply;
 - (3) Receive prior approval of the chief procurement officer or a designee; and
 - (4) Be made a part of the contract file upon award by the procurement officer.
- [Eff DEC 15 1995] (Auth: HRS §103D-202)
(Imp: HRS §103D-303)

§§3-122-60 to 3-122-61 (Reserved).

§3-122-62

SUBCHAPTER 7

PROCUREMENT OF PROFESSIONAL SERVICES

§3-122-62 Definition. As used in this subchapter:

"Professional services" means those services within the scope of the practice of architecture, landscape architecture, professional engineering, land surveying, real property appraisal, law, medicine, accounting, dentistry, or any other practice defined as professional pursuant to section 415A-2, HRS, or the professional and scientific occupation series contained in the United States Office of Personnel Management's Qualifications Standards Handbook. The list of professional and scientific positions from the handbook shall be provided by procurement directive.

[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-304)

§3-122-63 Procurement of professional services.

- (a) This subchapter provides rules for procuring

professional services pursuant to section 103D-304, HRS.

(b) Notwithstanding any provision of chapter 103D, HRS, or any rule under this subtitle, no contract for professional services shall be awarded unless:

- (1) The professional services to be procured shall be in accordance with sections 103D-302, 103D-303, 103D-304, 103D-305, 103D-306, or 103D-307, HRS; and
- (2) The contract shall be awarded on the basis of demonstrated competence and qualification for the type of services required at fair and reasonable prices.

(c) Contract change orders or modifications for professional services awarded pursuant to 103D-303 or 103D-304, HRS, shall require prior approval of the head of the purchasing agency when the increase is at least \$25,000 and ten per cent of the initial contract price. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-304)

§3-122-64 Annual public notice for professional services. (a) At least annually, before the beginning
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of the fiscal year and more often as may be necessary, the head of the purchasing agency shall, pursuant to section 3-122-24(c), invite persons engaged in performing professional services to submit current statements of qualifications and expressions of interest to purchasing agencies requiring the services which the agency anticipates needing in the next fiscal year. The statements shall include:

- (1) The name of the firm or person, the principal place of business, and location of all of its offices;
- (2) The age of the firm and its average number of employees over the past years;
- (3) The education, training, and qualifications of key members of the firm;
- (4) The names and phone numbers of up to five clients who may be contacted, including at least two for whom services were rendered during the preceding year; and

- (5) Any promotional or descriptive literature which the firm desires to submit.

Firms or persons may amend statements of qualifications at any time by filing a new statement and shall immediately inform the head of the purchasing agency of any change in their submission that would disqualify the firm or person from being considered for a contract award.

(b) Additional public notices inviting persons engaged in providing professional services may be made if the response to the initial notice is not adequate, the response to the initial notice does not result in an adequate representation of available sources, or previously unanticipated needs for professional services arise.

(c) Agencies may also utilize the names of qualified persons from other agency lists.

[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-304)

§3-122-65 Procedures for procurement of professional services. (a) The head of the purchasing agency shall designate a review committee to evaluate statements of qualifications and related information submitted to that purchasing agency for the purpose of compiling a list of qualified persons to provide particular types of professional services. The review committee shall consist of at least three

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employees from the agency or from another governmental body with sufficient education, training, and licenses or credentials for each type of professional service which may be required.

(b) If a purchasing agency identifies a need to procure professional services pursuant to section 103D-304(d), HRS, it shall proceed as follows:

- (1) Establish a screening committee of at least three employees of the purchasing agency with sufficient education, training, and licenses or credentials in the area of the services required. If the purchasing agency and the using agency are different, at least one qualified employee shall be from the using agency, appointed by the head of the using

agency. Employees of other agencies may be designated to serve on the committee only if qualified employees from the purchasing and using agencies are not available.

- (2) The screening committee shall establish criteria for the selection of the names of three persons from the subsection (a) list of qualified persons who the committee concludes are the most qualified to provide the services required.
- (3) The screening committee shall evaluate the submissions of subsection (a) list of qualified persons against the criteria established for selection. The committee may conduct confidential discussions with any person on the subsection (a) list of qualified persons regarding the services which are required and the services they are able to provide. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors;
- (4) The screening committee shall provide the head of the purchasing agency with the names of the three persons that have been determined to be the most qualified, together with a summary of their qualifications;
- (5) The head of the purchasing agency shall evaluate the summary of qualifications of the three persons provided by the screening committee and may conduct discussions with any of the three persons. He shall rank each person in order of preference;

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- (6) The head of the purchasing agency shall negotiate a contract that is established in writing and based upon the estimated value, scope, complexity, and nature of the services to be rendered, including the rate of compensation which is fair and reasonable, as follows:
 - (A) Negotiation shall be conducted with the first person;

- (B) If a satisfactory contract cannot be negotiated with the first person, negotiations with that person shall be formally terminated and negotiations with the second person shall commence;
- (C) If negotiations fail with the second person, negotiations with the last person shall commence; and
- (D) If a contract at a fair and reasonable price cannot be negotiated, the screening committee may be asked to submit the names of three additional persons for the head of the purchasing agency to rank, and resume negotiations in the same manner provided in this subsection.

(7) Negotiations shall be conducted confidentially.

(c) Pursuant to subchapter 15, cost or pricing data shall be submitted to the head of the purchasing agency for any contract expected to exceed \$100,000. This requirement may be waived only under the provisions of section 3-122-124.

(d) After the contract is signed by all parties, the list of qualified persons and the award, except those portions for which a qualified person has made a written request for confidentiality subject to subsection 3-122-59(c), shall be open to public inspection. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-304)

§3-122-66 Waiver to requirement for procurement of professional services. (a) If less than three persons are qualified pursuant to section 3-122-65, the head of the purchasing agency may determine that for a given request:

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- (1) Negotiations may be conducted provided that:
 - (A) The prices submitted are fair and reasonable; and

- (B) Other prospective offerors had reasonable opportunity to respond; or there is not adequate time to resolicit through public notice statements of qualifications and expressions of interest; or
 - (2) The offers may be rejected pursuant to subchapter 11 and new expressions of interest may be solicited if the conditions in subparagraphs (A) and (B) are not met;
 - (3) The proposed procurement may be cancelled; or
 - (4) An alternative procurement method may be conducted to include but not be limited to direct negotiations with other offerors if the head of the purchasing agency determines in writing that the need for the service continues, but that the price of the offers received are not fair and reasonable and there is no time for resolicitation, or resolicitation would likely be futile.
- (b) If no responses are qualified pursuant to section 3-122-65, the head of the purchasing agency may determine that for a given request it is neither practicable nor advantageous for the State to procure a service by again soliciting expressions of interest.
- (1) When making this determination, consideration shall be given to the competition in the marketplace and whether the additional potential cost of preparing, soliciting and evaluating responses is expected to exceed the benefits normally associated with the solicitations; and
 - (2) In the event of this determination, a more cost effective procurement method may be selected, to include but not be limited to direct negotiations.
- (c) Documentation of the alternative procurement method selected shall:
- (1) State the reasons for selection and length of contract period;
 - (2) State why the provisions of subchapters 8, 9, and 10 do not apply;
 - (3) Receive prior approval of the chief procurement officer or a designee; and
 - (4) Be made a part of the contract file upon

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award by the procurement officer.
[Eff DEC 15 1995] (Auth: HRS §103D-202)
(Imp: HRS §103D-304)

§3-122-67 Small purchases of professional services. (a) Contracts for professional services of less than \$10,000 may be negotiated by the head of a purchasing agency with any two persons who appear on the list of qualified persons established pursuant to section 3-122-65(a).

(b) Negotiations shall be conducted in the manner set forth in section 3-122-65(b)(5) but without establishing any order of preference.

[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-305) (Imp: HRS §§103D-304, 103D-305)

§3-122-68 Record of procurement actions. (a) Pursuant to section 103D-321, HRS, the chief procurement officer shall maintain a record by fiscal year of all procurements made under section 103D-304, HRS, for a minimum of five years. The record shall be available for public inspection.

(b) By August 15 of each year, the chief procurement officer shall forward a copy of the record to the administrator. The record shall reflect procurement actions for the prior fiscal year and shall contain at a minimum:

- (1) Each contractor's name;
- (2) The amount and type of each contract; and
- (3) A listing of the goods, services, or construction procured under each contract.

(c) The administrator shall forward a consolidated report to the legislature by October 1 and provide an information copy to the procurement policy board. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-321)

§§3-122-69 to 3-122-72 (Reserved).

SUBCHAPTER 8

SMALL PURCHASES

§3-122-73

§3-122-73 Definitions. As used in this subchapter:

"Adequate and reasonable competition" means the amount of vendors solicited based upon the number of vendors available and the value or price of the goods, service, or construction. Because of variations in circumstances, it is not possible to define what is adequate and reasonable competition for every small procurement. However, in general, the more vendors there are that can meet the needs of the agency, or the higher the price of the goods, services, or construction, then a greater number of vendors should be solicited. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-305) (Imp: HRS §§103D-104, 103D-305)

§3-122-74 Conditions for use. (a) Expenditures less than \$10,000 for goods or services, or less than \$25,000 for construction, shall be made in accordance with the following procedures. Expenditures made pursuant to these procedures do not require public notice or public bid openings.

(b) Contracts for professional services of less than \$10,000 may be procured pursuant to this subchapter or subsection 103D-304(f), HRS.

(c) Unless otherwise exempt, purchasing agencies delegated small purchase authority shall also comply with state procurement office price lists or other chief procurement officer price lists, where applicable.

(d) Small purchases shall not be parceled by dividing the purchase of same, like, or related items of goods, services, or construction into several purchases of smaller quantities, so as to evade the statutory competitive bidding requirements. For additional details, refer to chapter 3-131.

(e) Preferences pursuant to chapter 3-124, shall not apply to small purchases. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-305) (Imp: HRS §103D-305)

§3-122-75 Goods and services. (a) Expenditure with an estimated total cost that is at least \$1,000 but less than \$10,000:

(1) Insofar as it is practical and based on the agency's specifications, adequate and

reasonable competition of no less than three quotations shall be solicited; and

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- (2) Considering all factors, including but not limited to quality, warranty and delivery, award shall be made to the vendor with the most advantageous quotation.

(b) Expenditure with an estimated total cost that is less than \$1,000 shall be by procedures established by each chief procurement officer.

[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-305)
(Imp: HRS §103D-305)

§3-122-76 Construction. (a) Expenditure with an estimated total cost that is at least \$4,000 but less than \$25,000:

- (1) Insofar as it is practical and based on the agency's specifications, adequate and reasonable competition of no less than three quotations shall be solicited; and

- (2) Award shall be made to the vendor submitting the lowest quotation.

(b) Expenditure with an estimated total cost that is less than \$4,000 shall be by procedures established by each chief procurement officer.

[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-305)
(Imp: HRS §103D-305)

§3-122-77 Procurement file. All quotations received shall be recorded and placed in a procurement file. When three quotations are required but are not obtained i.e. insufficient sources, sole sources, emergencies, the reason shall be recorded and placed in the procurement file. The file shall also include a written justification when award is made to other than the vendor submitting the lowest quotation.

[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-305)
(Imp: HRS §103D-305)

§§3-122-78 to 3-122-80 (Reserved).

SUBCHAPTER 9

SOLE SOURCE PROCUREMENT

§3-122-81 Conditions for use. (a) A sole source

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purchase may be made when there is only one source available from which a particular good, service, or construction may be obtained. This rule shall apply to all sole source expenditures for goods and services that are \$10,000 or more and all construction that is \$25,000 or more, unless the expenditure is expressly exempt from public bidding by law or rule. For expenditures less than the above bid levels, agencies shall follow the procedures for small purchases.

(b) To justify a sole source purchase, an agency must establish that:

- (1) The particular good, service, or construction has a unique feature, characteristic, or capability, e.g.:
 - (A) Proprietary item;
 - (B) Compatibility to existing equipment; or
 - (C) Public utility repair or construction that can only be provided by the utility company;
- (2) The unique feature, characteristic, or capability is essential in order for the agency to accomplish its work; and
- (3) The particular good, service, or construction having the unique feature, characteristic, or capability is available from only one supplier or source.

(c) When a good or service is necessary in a limited quantity for test or evaluation, the purchase of the item or service may be on a sole source basis with the approval of the chief procurement officer.

(d) When an item is referred to by an exact brand, but there are other brands that qualify as "equals," the purchase shall be subject to bidding.

(e) When an item is unique, but is available from more than one supplier, the purchase shall be considered a "restrictive" purchase rather than a sole source purchase and shall be subject to bidding.

(f) The fact that a person or organization is or has been furnishing services to a purchasing agency does not, by itself, render the person or organization the only source for the type of service required.

(g) The potential loss of funds at the end of a fiscal year shall not be a basis for sole source exemption.

(h) The procurement officer should conduct negotiations with the sole source vendor to determine the factors as cost, quality, terms, and delivery.

(i) Pursuant to subchapter 15, cost or pricing

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data shall be submitted to the procurement officer by the vendor for any contract expected to exceed \$100,000. This requirement may be waived only under the provisions of section 3-122-124.

(j) If the sole source purchase is approved, the purchasing agency shall, pursuant to section 103D-309, HRS, and subchapter 12, obtain certification that funds are available for the amount of the purchase.

(k) Pursuant to section 103D-306(c), HRS, the procurement policy board shall maintain a list which constitutes sole source procurements that may be procured without obtaining a sole source exemption, pursuant to section 3-122-82. However, the chief procurement officer may request reports from the heads of purchasing agencies on procurements made pursuant to this subsection.

The list of sole source procurements shall be reviewed by the board annually for changes and is attached at the end of this chapter as exhibit titled "Procurements Approved for Sole Source", dated 11/7/95. Purchasing agencies shall cite on the purchase order or on the contract the sole source authority as "Approved for Sole Source Procurement pursuant to Section 3-122-81, (cite sole source number from attached list), Hawaii Administrative Rules". [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-306, 103D-312) (Imp: HRS §§103D-306, 103D-309, 103D-312)

§3-122-82 Requesting sole source approval. (a)
Forms required to implement the provisions for sole

source approval will be distributed by the chief procurement officer.

(b) To obtain sole source approval from the chief procurement officer, the following procedures shall be followed:

- (1) Complete and submit a "Request For Sole Source" to the chief procurement officer. Heads of purchasing agencies shall certify to the best of their knowledge that the information provided is true and correct;
- (2) If a rush review of a request is needed, complete and submit a separate memorandum explaining and justifying the reason for the rush review; and
- (3) Complete and submit a "Notice of Sole Source" which shall serve as a written determination to issue a sole source contract.

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(c) The chief procurement officer and the purchasing agency shall post a copy of the "Notice of Sole Source" in an area accessible to the public, at least seven days prior to any approval action.

- (1) Any inquiries shall be directed to the designated contact person of the purchasing agency.
- (2) Any objections to the request for sole source shall be submitted in writing and received by the chief procurement officer within seven days from the date the notice was posted. The chief procurement officer shall place the sole source request on hold, review the objection, and provide a written response to the person submitting the objection. All documents relating to the objection, including written summary of the disposition of the objection, shall be kept with the sole source file. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-306) (Imp: HRS §103D-306)

§3-122-83 Amendments to sole source contracts.
Amendments to sole source contracts that would change the original scope of the contract, or increase the

original contract price by ten per cent or more, may only be made with the approval of the chief procurement officer. The annual renewal of a sole source contract for services should not be submitted as an amendment. To amend a sole source contract, the following procedures shall be followed:

- (1) Complete and submit a "Notice of Amendment to Sole Source Contract" to the chief procurement officer. Heads of purchasing agencies shall certify to the best of their knowledge that the information provided is true and correct;
- (2) Submit copy of the contract or agreement between the agency and the contractor with the "Notice of Amendment to Sole Source Contract";
- (3) The chief procurement officer and the purchasing agency shall post a copy of the "Notice of Amendment to Sole Source Contract" in an area accessible to the public, at least seven days prior to any approval action;
- (4) Any inquiries shall be directed to the

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designated contact person of the purchasing agency; and

- (5) Any objections to the amendments to sole source contracts shall be submitted in writing and received by the chief procurement officer within seven days from the date the notice was posted. The chief procurement officer shall place the sole source request on hold, review the objection and provide a written response to the person submitting the objection. All documents relating to the objection, including a written summary of the disposition of the objection, shall be kept with the sole source file.

[Eff DEC 15 1995] (Auth: HRS §103D-202)
(Imp: HRS §103D-306)

§3-122-84 Record of procurement actions. (a)
Pursuant to section 103D-321, HRS, the chief procurement officer shall maintain a record by fiscal

year of all procurements made under section 103D-306, HRS, for a minimum of five years.

(b) By August 15 of each year, the chief procurement officer shall forward a copy of the record to the administrator. The record shall reflect procurement actions for the prior fiscal year and be in the format prescribed by the administrator.

(c) The administrator shall forward a consolidated report to the legislature by October 1 and provide an information copy to the procurement policy board. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-321)

§§3-122-85 to 3-122-87 (Reserved).

SUBCHAPTER 10

EMERGENCY PROCUREMENT

§3-122-88 Application. This subchapter shall apply to all emergency procurement expenditures for goods and services, \$10,000 or more and construction, \$25,000 or more. For expenditures less than the dollar levels stated herein, agencies shall follow the

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procedures for small purchases. Emergency procurement may be utilized only to purchase that which is necessary to cover the emergency, subsequent requirements shall be obtained using normal purchasing procedures. The potential loss of funds at the end of a fiscal year is not considered to be an emergency. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-307)

§3-122-89 Definition. As used in this subchapter:

"Emergency condition" means a situation which creates a threat to public health, welfare, or safety that may arise by reason of major natural disaster, epidemic, riot, fire, or other reasons as may be

proclaimed by the head of a purchasing agency. The emergency condition creates an immediate and serious need for goods, services, or construction that cannot be met through normal procurement methods, the lack of which would seriously threaten the continued function of government, the preservation or protection of property, or the health or safety of any person.
[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-307)

§3-122-90 Procedures. (a) Prior to the procurement or if time does not permit, as soon as practicable thereafter, the head of the purchasing agency responsible for the emergency procurement shall prepare a written determination requesting the approval from the chief procurement officer, indicating the following:

- (1) Nature of the emergency;
- (2) Name of contractor;
- (3) Amount of expenditure;
- (4) Listing of the good, service, or construction; and
- (5) Reason for selection of the contractor.

(b) Competition as is practicable shall be obtained to assure that the required good, service, or construction item is procured in time to meet the emergency.

(c) As soon as is practicable, a confirming purchase order must be prepared. Include in detail any agreements, including price, made orally with the contractor.

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(d) Pursuant to subchapter 15, cost or pricing data shall be submitted to the procurement officer by the vendor for any award expected to exceed \$100,000. However, data for an emergency procurement may be submitted after award. This requirement may be waived only under the provisions of section 3-122-124.
[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-307)

§3-122-91 Record of procurement actions. (a) Pursuant to section 103D-321, HRS, the chief

procurement officer shall maintain a record by fiscal year of all procurements made under section 103D-307, HRS, for a minimum of five years.

(b) By August 15 of each year, the chief procurement officer shall forward a copy of the record to the administrator. The record shall reflect procurement actions for the prior fiscal year and be in the format prescribed by the administrator.

(c) The administrator shall forward a consolidated report to the legislature by October 1 and provide an information copy to the procurement policy board. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-321)

§§3-122-92 to 3-122-94 (Reserved).

SUBCHAPTER 11

CANCELLATION OF SOLICITATIONS AND REJECTION OF OFFERS

§3-122-95 Cancellation of solicitations and rejection of offers. (a) An invitation for bids, a request for proposals, or any other solicitation may be cancelled, or a bid, proposal, or any other offer may be rejected in whole or in part as may be specified in the solicitation, in accordance with the provisions of this section.

(b) The reasons for the cancellation or rejection shall:

(1) Include but not be limited to cogent and compelling reasons why the cancellation of the solicitation or rejection of the offer is

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in the purchasing agency's best interest; and

(2) Be made part of the contract file.

(c) Each solicitation issued by the purchasing agency shall state that the solicitation may be cancelled or offers may be rejected in whole or in part when in the best interest of the purchasing agency as provided in this subchapter. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-308) (Imp: HRS §103D-308)

§3-122-96 Cancellation of solicitation. (a) A solicitation shall be cancelled for reasons including but not limited to the following:

- (1) Cancellation prior to opening:
 - (A) The agency no longer requires the goods, services, or construction;
 - (B) The agency no longer can reasonably expect to fund the procurement; or
 - (C) Proposed amendments to the solicitation would be of a magnitude that a new solicitation is desirable.
- (2) Cancellation after opening but prior to award:
 - (A) The goods, services, or construction being procured are no longer required;
 - (B) Ambiguous or otherwise inadequate specifications were part of the solicitation;
 - (C) The solicitation did not provide for consideration of all factors of significance to the agency;
 - (D) Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
 - (E) All otherwise acceptable offers received are at clearly unreasonable prices; or
 - (F) There is reason to believe that the offers may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith.

(b) A notice of cancellation shall be sent to all businesses solicited and the notice shall include:

- (1) Identity of the solicitation;
- (2) Brief explanation of the reason(s) for cancellation; and
- (3) Where appropriate, an explanation that an

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opportunity will be given to compete on any resolicitation or any future procurements of similar goods, services, or construction.

(c) Documentation on the reasons for cancellation shall be made a part of the procurement file and shall be available for public inspection.

[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-308)
(Imp: HRS §103D-308)

§3-122-97 Rejection of bids and proposals. (a)
Bids shall be rejected for reasons including but not limited to:

- (1) The bidder that submitted the bid is nonresponsive as determined by subchapter 13;
- (2) The bid is not responsive, that is, it does not conform in all material respects to the invitation for bids under the provisions of subchapter 13; or
- (3) The good, service, or construction item offered in the bid is unacceptable by reason of its failure to meet the requirements of the specifications or permissible alternates or other acceptability criteria set forth in the invitation for bids under the provisions of section 3-122-33.

(b) Proposals need not be unconditionally accepted without alteration or correction, unless the solicitation states otherwise, and the agency's stated requirements may be revised or clarified after proposals are submitted.

- (1) This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal.
- (2) Reasons for rejecting proposals include but are not limited to:
 - (A) The offeror that submitted the proposal is nonresponsive as determined under subchapter 13;
 - (B) The proposal ultimately, after any opportunity has passed for altering or clarifying the proposal, fails to meet the announced requirements of the agency in some material respect; or
 - (C) The proposed price is clearly unreasonable.

(c) Unless allowed by the solicitation, an offer

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may not limit acceptance to the entire offer:

- (1) If acceptance is so limited, the offers shall be deemed to be nonresponsive.
- (2) If the offer is properly so limited, the purchasing agency shall not reject part of the offer and award on the remainder.
- (d) A notice of rejection shall be sent to the individual offeror advising of the reasons therefor.
[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-308)
(Imp: HRS §103D-308)

§3-122-98 Disposition of offers. When offers are rejected, or a solicitation cancelled after offers are received:

- (1) The offers which have been opened shall be retained in the procurement file; and
- (2) The unopened offers shall be returned to the offerors upon request; or otherwise disposed of. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-308) (Imp: HRS §103D-308)

§§3-122-99 to 3-122-101 (Reserved).

SUBCHAPTER 12

CONTRACT NOT BINDING UNLESS FUNDS AVAILABLE

§3-122-102 Contract not binding unless funds available. (a) No contract awarded pursuant to the following methods of source selection shall be binding or of any force and effect without an endorsement by the respective chief financial officer, as the case may be, that there is an appropriation or balance of an appropriation over and above all outstanding contracts sufficient to cover the amount required by the contract:

- (1) Competitive sealed bidding, pursuant to subchapter 5;
 - (2) Competitive sealed proposals, pursuant to subchapter 6; and
 - (3) Sole source procurement, pursuant to subchapter 9.
- (b) Exceptions to the certification of funds requirement in subsection (a) are as follows:
- §3-122-103

- (1) If a contract is a multi-term contract pursuant to section 3-122-149, the respective chief financial officer, as the case may be, shall only be required to certify that there is an appropriation or balance of an appropriation over and above all outstanding contracts, that is sufficient to cover the amount required to be paid under the contract during the current fiscal year or remaining portion of the current fiscal year of the first term of the multi-term contract. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefore from sources which are identified in writing;
 - (2) If the contract is one under which the total amount to be paid to the contractor cannot be accurately estimated at the time the contract is to be awarded; and
 - (3) If there is no direct expenditure of public funds from the State to the contractor.
- (c) Notwithstanding the requirement for certification set forth above, certification of a portion of the total funds required for a contract may be permitted when an immediate solicitation will result in significantly more favorable contract terms and conditions to the State than a solicitation made at a later date; provided that certification for partial funding shall be permitted only if the respective chief financial officer, as the case may be, states in the certificate that the availability of funds in excess of the amount certified as available shall be contingent upon future appropriations or special fund revenues. All contracts partially funded shall be enforceable only to the extent to which funds have been certified as available. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §§103D-309, 103D-315)

§3-122-103 Contracts involving federal funds.

- (a) In any contract involving not only state or county funds but supplemental funds from the federal government, this section shall be applicable only to that portion of the contract price as is payable out of state or county funds; however, shall be liberally

construed so as not to hinder or impede the State in contracting for any project involving financial aid

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from the federal government.

(b) Any contract supplemented by federal funds shall contain a statement to the effect that parties to the contract agree that, as to the portion of the obligation under the contract to be payable out of federal funds, the contract shall be construed to be an agreement to pay the portion to the contractor only out of federal funds to be received from the federal government when the federal funds are so received and shall not be construed as a general agreement to pay the portion at all events out of any funds other than those which are received from the federal government. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-309)

§3-122-104 Contracts utilizing one hundred per cent federal funds. Any contract funded one hundred per cent by federal funds shall contain a statement to the effect that the parties agree that the contract shall be construed as an agreement to pay the contract price only out of federal funds to be received from the federal government when the federal funds are so received and shall not be construed as a general agreement to pay the amount at all events out of any funds other than those which are received from the federal government. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-309)

§§3-122-105 to 3-122-107 (Reserved).

SUBCHAPTER 13

RESPONSIBILITY OF BIDDERS AND OFFERORS

§3-122-108 Qualification of bidders and offerors.
(a) Prospective bidders or offerors must be capable of performing the work for which offers are being called.

Each prospective bidder or offeror must file a written or faxed notice of intention to submit an offer pursuant to section 3-122-9, subject to the following:

- (1) The notice of intention to submit an offer shall be received not less than ten days prior to the date designated for opening.
- (2) A notice of intention to submit an offer must

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be filed for the construction of any public building or public work when the bid is \$25,000 or more.

- (3) A notice of intention to submit an offer need not be filed for the procurement of goods and services, unless specified in the solicitation.
- (4) The requirement for a notice of intention to submit an offer may be waived if the procurement officer concludes that acceptance of the bid will be in the best interest of the public. For this purpose, the procurement officer shall prepare a written determination setting forth the basis for the acceptance.

(b) Upon notification of the bidder's intent to submit an offer, the procurement officer shall determine whether the prospective offeror has the ability to perform the work intended. For this purpose, the procurement officer may require any prospective offeror to submit answers to questions contained in the sample questionnaire provided by the policy board.

- (1) All information contained in answers to the questionnaire shall be and remain confidential. Questionnaires so submitted shall be returned to the bidders after having served their purpose.
- (2) Any government officer or employee who knowingly divulges or permits to be divulged any information to any person not lawfully entitled thereto shall be fined not more than \$250.00. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-310) (Imp: HRS §103D-310)

§3-122-109 Questionnaire. (a) The questionnaire shall request information for the following categories:

- (1) Financial ability to deliver the goods or perform the work required;
- (2) Material, equipment, facility, and personnel resources and expertise available, or the ability to obtain them, in order to meet contractual requirements;
- (3) References for the determination of a satisfactory record of performance;
- (4) References for the determination of a

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- (5) Legal qualifications to contract with the State; and
- (6) Additional information necessary for a determination of responsibility.
[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-310) (Imp: HRS §103D-310)

§3-122-110 Determination of responsibility. (a) The procurement officer shall determine, on the basis of available information, the responsibility or nonresponsibility of a prospective offeror.

(b) If the procurement officer requires additional information, the prospective offeror shall promptly supply the information. Failure to supply the requested information at least forty-eight hours prior to the time advertised for the opening shall be considered unreasonable and may be grounds for a determination of nonresponsibility.

(c) Notwithstanding the provision of paragraph (b), the head of the purchasing agency shall not be precluded from requesting additional information.

(d) Upon determination that a prospective offeror is not fully qualified to perform the work, the head of the purchasing agency or designee shall afford the prospective offeror an opportunity to be heard. Upon conclusion of the hearing and if still of the opinion that the bidder is not fully qualified to perform the work, the head of the purchasing agency or designee

shall refuse to receive or consider any offer made by the prospective offeror.

(e) A written determination of nonresponsibility of an offeror shall be made by the head of the purchasing agency. The prospective offeror shall be immediately notified of the determination. The decision of the head of the purchasing agency shall be final unless the offeror applies for administrative review pursuant to chapter 3-126.

[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-310) (Imp: HRS §103D-310)

§§3-122-111 to 3-122-115 (Reserved).

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SUBCHAPTER 14

PREQUALIFICATION OF SUPPLIERS

§3-122-116 Conditions for prequalification of suppliers. Prequalification of suppliers for particular types of goods, services, and construction shall be allowed under the following conditions:

- (1) To limit a solicitation to those vendors who meet statutory or licensing requirements applicable to the solicitation;
- (2) To minimize the time necessary to verify vendor qualifications which otherwise would jeopardize timely award of contracts.

[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-311) (Imp: HRS §103D-311)

§3-122-117 Prequalification of suppliers. Prospective suppliers may also be prequalified and listed for a particular type of good, service, or construction. However, the following stipulations shall be made with regards to the list:

- (1) Distribution of the solicitation shall not be limited to only prequalified suppliers;

- (2) A prospective supplier shall not be denied award of a contract simply because the supplier was not prequalified;
- (3) The fact that a prospective supplier has been prequalified does not necessarily represent a finding of responsibility; and
- (4) The fact that a prospective supplier has been prequalified does not necessarily represent product acceptability. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-311) (Imp: HRS §103D-311)

§§3-122-118 to 3-122-120 (Reserved).

SUBCHAPTER 15

COST OR PRICING DATA

§3-122-121 Scope and application. This

§3-122-121

subchapter sets forth the pricing policies which are applicable to contracts of any type and any price adjustments thereunder when cost or pricing data are required to be submitted. The provisions of this subchapter requiring submission of cost or pricing data do not apply to small purchases or to a contract let by competitive sealed bidding or multi-step bidding. However, cost or pricing data may be required under a contract let by competitive sealed bidding when price adjustments are subsequently made to the contract pursuant to section 3-122-123 and, to this extent, those provisions would apply. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-312)

§3-122-122 Cost or pricing data defined. Cost and pricing data means all facts as of the date of price agreement that prudent buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are factual, not judgmental, and are therefore verifiable. While they

do not indicate the accuracy of a prospective contractor's judgment about future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all facts that can reasonably be expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. They also include factors as:

- (1) Vendor quotations;
 - (2) Nonrecurring costs;
 - (3) Information on changes in production methods and in production or purchasing volume;
 - (4) Data supporting projections of business prospects and objectives and related operations costs;
 - (5) Unit cost trends as those associated with labor efficiency;
 - (6) Make or buy decisions;
 - (7) Labor union contract negotiations; and
 - (8) Information on management decisions that could have a significant bearing on costs.
- [Eff DEC 15 1995] (Auth: HRS §103D-202)
(Imp: HRS §103D-312)

§3-122-123 Requirement for cost or pricing data.

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Cost or pricing data are required to be submitted in support of a proposal when:

- (1) Any contract expected to exceed \$100,000 is to be awarded by competitive sealed proposal, sole source procurement, or the procurement of professional services pursuant to subchapter 7;
- (2) Adjusting the price of any contract, including a contract awarded by competitive sealed bidding, whether or not cost or pricing data were required in connection with the initial pricing of the contract, if the adjustment involves both aggregate increases and decreases in costs plus applicable profits expected to exceed \$100,000. However, this requirement shall not apply

when unrelated and separately priced adjustments for which cost or pricing data would not be required if considered separately are consolidated for administrative convenience;

- (3) An emergency procurement is made in excess of \$100,000; however, data may be submitted after contract award; or
- (4) The procurement officer makes a written determination that the circumstances warrant requiring submission of cost or pricing data provided, however, cost or pricing data shall not be required where the contract award is made pursuant to competitive sealed bidding. However, generally cost or pricing data should not be required where the contract or modification is less than \$25,000. Moreover, when less than complete cost analysis, for example; analysis of only specific factors will provide a reasonable pricing result on awards under \$100,000 without the submission of complete cost or pricing data, the procurement officer shall request only that data considered adequate to support the limited extent of the cost analysis needed and need not require certification.

[Eff DEC 15 1995] (Auth: HRS §103D-202)
(Imp: HRS §103D-312)

§3-122-124 Exceptions to the requirement for cost or pricing data. (a) Cost and pricing data need not
§3-122-124

be submitted or certified where the contract price is based on:

- (1) Adequate price competition, as defined herein:
Price competition exists if multiple offers or proposals are solicited and at least two responsible offerors independently compete for a contract to be awarded to the responsible offeror submitting the lowest evaluated price by submitting priced offers, or best and final offers, meeting the requirements of the solicitation. A price is

"based on" adequate price competition if a contract results directly from price competition. If the foregoing conditions are met, price competition shall be presumed to be "adequate" unless the procurement officer determines in writing that the competition is not adequate.

- (2) Established catalogue prices or market prices, as defined herein:
 - (A) "Established catalogue price" means the price included in a catalogue, price list, schedule, or other form that is regularly maintained by a manufacturer or contractor; is either published or otherwise available for inspection by customers; and states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general (non-government) buying public for the goods or services involved.
 - (B) "Established market price" means a current price, established in the usual and ordinary course of trade between buyers and sellers, which can be substantiated from sources which are independent of the manufacturer or supplier and may be an indication of the reasonableness of price.
- (3) Prices set by law or regulation, as defined herein:

The price of a good or service is set by law or rule if some governmental body establishes the price that the offeror or contractor may charge the State and other customers.
- (b) If, despite the existence of an established

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catalogue price or market price, and after consultation with the prospective contractors, the procurement officer considers that the price is not reasonable, cost or pricing data may be requested. Where the reasonableness of the price can be assured by a request for cost or pricing data limited to data pertaining to the differences in the item or services being procured

and those listed in the catalogue or market, requests should be so limited.

(c) When the chief procurement officer or the head of a purchasing agency determines in writing to waive the applicable requirements of paragraphs (1), (2), or (3) in section 3-122-123 for submission of cost or pricing data in a particular pricing action and the reasons for the waiver are stated in the determination. A copy of the determination shall be kept in the contract file and made available to the public upon request.

(d) If after cost or pricing data were initially requested and received, it is determined that adequate price competition does exist, the data need not be certified. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-312) (Imp: HRS §103D-312)

§3-122-125 Submission of cost or pricing data and certification. (a) When cost or pricing data are required, they shall be submitted to the procurement officer prior to beginning price negotiations at any reasonable time and in any reasonable manner prescribed by the procurement officer. When the procurement officer requires the offeror or contractor to submit cost or pricing data in support of any proposal, the data shall either be actually submitted or specifically identified in writing.

(b) The offeror or contractor is required to keep the submission current until the negotiations are concluded.

(c) The offeror or contractor shall certify as soon as practicable after agreement is reached on price that the cost or pricing data submitted are accurate, complete, and current as of the date of reaching agreement on price.

(d) A refusal by an offeror to supply the required data shall be referred to the chief procurement officer or the head of a purchasing agency, whose duty shall be to determine in writing whether to disqualify the noncomplying bidder or offeror, to defer §3-122-125

award pending further investigation, or to enter into the contract. A refusal by a contractor to submit the required data to support a price adjustment shall be

referred to the chief procurement officer or the head of a purchasing agency who shall determine in writing whether to further investigate the price adjustment, not to allow any price adjustment, or to set the amount of the price adjustment, subject to the contractor's rights under chapter 3-126. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-312)

§3-122-126 Certificate of current cost or pricing data. (a) When cost or pricing data must be certified, the certificate of current cost or pricing data form provided by the policy board shall be included in the contract file along with any award documentation required under this subchapter. The offeror or contractor shall be required to submit the certificate as soon as practicable after agreement is reached on the contract price or adjustment.

(b) Although the certificate pertains to "cost or pricing data," it is not to be construed as a representation as to the accuracy of the offeror's or contractor's judgment on the estimated portion of future costs or projections. It does, however, constitute a representation as to the accuracy of the data upon which the offeror's or contractor's judgment is based. A certificate of current cost or pricing data shall not substitute for examination and analysis of the offeror's or contractor's proposal.

(c) Whenever it is anticipated that a certificate of current cost or pricing data may be required, notice of this requirement shall be included in the solicitation. If a certificate is required, the contract shall include a clause giving the State a contract right to reduction in the price as provided herein.

(d) The exercise of an option at the price established in the initial negotiation in which certified cost or pricing data were used does not require recertification or further submission of data. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-312)

§3-122-127 Defective cost or pricing data. (a)
If certified cost or pricing data are subsequently
§3-122-128

found to have been inaccurate, incomplete, or not current as of the date stated in the certificate, the State is entitled to an adjustment of the contract price, including profit or fee, to exclude any significant sum by which the price, including profit or fee, was increased because of the defective data. It is presumed that overstated cost or pricing data increased the contract price in the amount of the defect plus related overhead and profit or fee. Therefore, unless there is a clear indication that the defective data were not used or relied upon, the price should be reduced by the amount. In establishing that the defective data caused an increase in the contract price, the procurement officer is not expected to reconstruct the negotiation by speculating as to what would have been the mental attitudes of the negotiating parties if the correct data had been submitted at the time of agreement on price.

(b) In determining the amount of a downward adjustment, the contractor shall be entitled to an offsetting adjustment for any understated cost or pricing data submitted in support of price negotiations for the same pricing action up to the amount of the State's claim for overstated cost or pricing data arising out of the same pricing action.

(c) If the contractor and the procurement officer cannot agree as to the existence of defective cost or pricing data or amount of adjustment due to defective cost or pricing data, the procurement officer shall set an amount in accordance with the provisions of this subchapter and the contractor may appeal this decision as a contract controversy under chapter 3-126.

[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-312)

§3-122-128 Cost analysis techniques. Cost analysis includes the appropriate verification of cost or pricing data, and the use of this data to evaluate:

- (1) Specific elements of costs which may include direct labor, indirect costs, direct material, other direct costs, subcontract costs, and fixed fee or profit;
- (2) The necessity for certain costs;
- (3) The reasonableness of amounts estimated for the necessary costs;
- (4) The reasonableness of allowances for contingencies;

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- (5) The basis used for allocation of indirect costs;
- (6) The appropriateness of allocations of particular indirect costs to the proposed contract; and
- (7) The reasonableness of the total cost or price. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-312)

§3-122-129 Price analysis techniques. (a) Price analysis is used to determine if a price is reasonable and acceptable. It involves an evaluation of the prices for the same or similar items or services. Examples of price analysis criteria include but are not limited to:

- (1) Price submissions of prospective bidders or offerors in the current procurement;
 - (2) Prior price quotations and contract prices charged by the bidder, offeror, or contractor;
 - (3) Prices published in catalogues or price lists;
 - (4) Prices available on the open market; and
 - (5) In-house estimates of cost.
- (b) In making the analysis, consideration must be given to any differing terms and conditions. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-312)

§3-122-130 Evaluation of cost or pricing data. Evaluations of cost or pricing data should include comparisons of costs and prices of an offeror's cost estimates with those of other offerors and any independent state price and cost estimates. They shall also include consideration of whether the costs are reasonable and allocable under the pertinent provisions of chapter 3-123. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-312)

§§3-122-131 to 3-122-132 (Reserved).

SUBCHAPTER 16

TYPES OF CONTRACTS

§3-122-134

§3-122-133 Restrictive or prohibitive use of certain types of contracts. (a) Subject to the limitations of this section, any type of contract that will promote the purchasing agency's best interests may be used, except that cost-reimbursement and cost-plus-a-percentage-of-cost contracts are:

- (1) Restricted to only when the chief procurement officer determines in writing that the contracts are likely to be less costly than any other type of contract or that it is impracticable to obtain the goods, services, or construction required except by means of the contracts.
 - (2) Prohibited if their use would jeopardize the receipt of federal assistance moneys or reduce the amount of the assistance under any applicable federal statute or regulation.
- (b) Award of a cost-plus-a-percentage-of-cost contract may not be made unless:
- (1) Notice is given to the head of the compliance audit unit, president of the senate, speaker of the house of representatives, and the chairpersons of the senate ways and means and house finance committees; and
 - (2) Notice is conspicuously posted in an area accessible to the public in the office of the procurement officer and available for public inspection during normal business hours.
[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-134 Selection of contract types. (a) The selection of an appropriate contract type depends on factors, including but not limited to:

- (1) The nature of the goods, services, or construction to be procured;
- (2) The uncertainties which may be involved in contract performance;
- (3) The extent to which the purchasing agency or the contractor is to assume the risk of the cost of performance of the contract; and

- (4) The degree of responsibility assumed by the contractor.
- (b) The objective when selecting a contract type is to obtain the best value in needed goods, services, or construction in the time required and at the lowest cost or price to the purchasing agency.

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- (1) To achieve this objective, the procurement officer, before choosing a contract type, should review the elements of the procurement which directly affect the cost, time, risk, and profit incentives bearing on the performance.
 - (2) Factors to be considered in selecting any type of contract include, but are not limited to:
 - (A) The type and complexity of the good, service, or construction item being procured;
 - (B) The difficulty of estimating performance costs as the inability of the agency to develop definitive specifications, to identify the risks to the contractor inherent in the nature of the work to be performed, or otherwise to establish clearly the requirement of the contract;
 - (C) The administrative costs to both parties;
 - (D) The degree to which the purchasing agency must provide technical coordination during the performance of the contract;
 - (E) The effect of the choice of the type of contract on the amount of competition to be expected;
 - (F) The stability of material or commodity market prices or wage levels;
 - (G) The urgency of the requirement; and
 - (H) The length of contract performance.
- [Eff DEC 15 1995] (Auth: HRS
§§103D-202, 103D-313) (Imp: HRS
§103D-313)

§3-122-135 Types of contracts. (a) Contract types described below are the principal contract types and any other type not described may be used, subject to the prohibition and restriction in section 3-122-133, and provided that the chief procurement

officer or head of a purchasing agency determines in writing that the use is in the State's best interest.

(b) Contract types are categorized based on the following and a type of contract may be a combination of any of the following:

(1) Compensation, which includes:

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- (A) Fixed-price contract, pursuant to section 3-122-136, as follows:
 - (i) Firm fixed-price contract; and
 - (ii) Fixed-price contract with price adjustment.
- (B) Cost-reimbursement contract, pursuant to section 3-122-137, as follows:
 - (i) Cost contract without fee;
 - (ii) Cost-plus-fixed fee contract of the completion form type or the term form type; and
 - (iii) Cost-plus-a-percentage-of-cost contract.
- (2) Cost incentives to provide special incentives to reduce total costs of performance, which includes:
 - (A) Cost-incentive contract, pursuant to section 3-122-138, as follows:
 - (i) Fixed-price cost incentive contract; and
 - (ii) Cost-reimbursement contract with cost incentive fee.
 - (3) Performance incentive, pursuant to section 3-122-139;
 - (4) Time and materials, pursuant to section 3-122-140;
 - (5) Labor hour, pursuant to section 3-122-141;
 - (6) Quantity, which includes:
 - (A) Definite quantity contract, pursuant to section 3-122-142; and
 - (B) Indefinite quantity contract, which includes requirements contract, pursuant to section 3-122-143.
 - (7) Use of multiple sources when conditions exist under which it is either necessary or advantageous to award a contract to more than one supplier for the same item on a solicitation, or for similar items, which includes:
 - (A) Incremental award contract of a definite quantity, pursuant to section 3-122-144;
 - (B) Multiple award contract of an indefinite quantity, pursuant to section 3-122-145; and

- (C) Geographic or regional award contract, pursuant to section 3-122-146.
 - (8) Passing of title, which includes lease contracts, pursuant to section 3-122-147;
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- (9) Installment purchase payments, pursuant to section 3-122-148; and
- (10) Length of contract, which includes multi-term contracts, pursuant to section 3-122-149.
[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-313, 103D-322) (Imp: HRS §§103D-313, 103D-315, 103D-322)

§3-122-136 The fixed-price contract. (a) The fixed-price contract is the only type of contract that can be used in competitive sealed bidding. It places responsibility on the contractor for the delivery of the goods or the complete performance of the services or construction in accordance with the contract terms at a price that may be firm or may be subject to contractually specified adjustments. It is appropriate for use when the extent and type of work necessary to meet the purchasing agency's requirements can be reasonably specified and the cost can be reasonably estimated, as is generally the case of construction or standard commercial products.

(b) The firm fixed-price contract is one type of fixed-price contract. It provides a price that is not subject to adjustment due to variations in the contractor's cost of performing the work specified in the contract. It should be used whenever prices which are fair and reasonable to the purchasing agency can be established at the outset. Bases upon which firm fixed prices may be established include:

- (1) Adequate price competition for the contract;
- (2) Comparison of prices in similar prior procurement in which prices were fair and reasonable;
- (3) Establishment of realistic costs of performance by utilizing available cost or price data and identifying certainties in contract performance; or
- (4) Use of other adequate means to establish a firm price.

(c) The fixed-price contract with price adjustment is another type of fixed-price contract. It provides for variation in the contract price under special conditions defined in the contract, other than customary provisions authorizing price adjustments due to modifications to the work. The formula or other

basis by which the adjustment in contract price can be made shall be specified in the solicitation and the

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resulting contract. Adjustment allowed may be upward or downward only or both upward and downward.

(d) Examples of conditions under which adjustments may be provided are:

- (1) In fixed-priced contracts:
 - (A) Changes in the contractor's labor agreement rates as supplied to industry or area wide; or
 - (B) Changes due to rapid and substantial price fluctuations, which can be related to an accepted index; and
- (2) In requirements contracts:
 - (A) When a general price change applicable to all customers occurs; or
 - (B) When a general price change alters the base price, as a change in a manufacturer's price to which a fixed discount is applied pursuant to the contract to determine the contract price. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-137 The cost-reimbursement contract. (a) The cost-reimbursement contract, subject to section 3-122-133, provides for payment to the contractor of allowable costs incurred in the performance of the contract as determined in accordance with subchapter 15 and as provided in the contract.

(b) It establishes at the outset an estimated cost for the performance of the contract and a dollar ceiling which the contractor may not exceed, except at its own expense, without prior approval or subsequent ratification by the procurement officer and, in addition, may provide for payment of a fee.

(c) It has a provision whereby the contractor agrees to perform as specified in the contract until the contract is completed or until the costs reach the specified ceiling, whichever occurs first.

(d) It is appropriate when the uncertainties involved in contract performance are of the magnitude that the cost of contract performance cannot be estimated with sufficient certainty to realize economy by use of any type of fixed-price contract.

(e) It necessitates appropriate monitoring by agency personnel during performance so as to give reasonable assurance that the objectives of the

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contract are being met.

(f) It is particularly suitable for research, development, and study type contracts.

(g) It may be used only when the head of the purchasing agency determines that:

- (1) A contract is likely to be less costly to the purchasing agency than any other type or that it is impracticable to obtain otherwise the goods, services, or construction;
- (2) The proposed contractor's accounting system will permit timely development of all necessary cost data in the form required by the specified contract type contemplated; and
- (3) The proposed contractor's accounting system is adequate to allocate costs in accordance with generally accepted accounting principles.

(h) The cost contract is one type of cost-reimbursement contract which provides that the contractor will be reimbursed for allowable costs incurred in performing the contract but will not receive a fee.

(i) The cost-plus-fixed fee contract is another type of cost-reimbursement contract:

- (1) It provides for payment to the contractor of an agreed fixed fee in addition to reimbursement of allowable incurred costs. The fee is established at the time of contract award and does not vary whether or

This form of cost-plus-fixed fee contract normally requires the

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contractor to complete and deliver the specified end-product as a condition for payment of the entire fixed-fee established for the work and within the estimated cost if possible. However, in the event the work cannot be completed within the estimated cost, the agency can elect to require more work and effort from the contractor without increase in fee provided it increases the estimated cost.

(B) The term form is one which describes the scope of work to be done in general terms and which obligates the contractor to devote a specified level of effort for a stated period of time. The fixed fee is payable at the termination of the agreed period of time. Payment is contingent upon certification that the contractor has exerted the level of effort specified in the contract in performing the work called for and that the performance is considered satisfactory by the purchasing agency.

(C) The completion form of the cost-plus-fixed fee contract is preferred over the term form whenever the following can be defined with sufficient precision to permit the development of estimates within which prospective contractors can reasonably be expected to complete the work:

- (i) The work itself; or
- (ii) Specific milestones which are definable points in a program when certain objectives can be said to have been accomplished.

(D) In no event should the term form of the cost-plus-fixed fee contract be used unless the contractor is obligated by the contract to provide a specific level-of-effort within a definite period of time.

(j) The cost-plus-a-percentage-of-cost contract is another type of cost-reimbursement contract. Its use is restricted or prohibited, pursuant to section 3-122-133. Prior to completion of the work, the parties agree that the fee will be a predetermined

percentage of the total cost of the work. The contract provides incentive for the contractor to incur cost at the expense of the State since the more the contractor spends, the greater its fee. [Eff DEC 15 1995]
(Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-138 The cost-incentive contract. (a) The cost-incentive contract provides for the reimbursement to the contractor of allowable costs incurred up to the ceiling amount and establishes a formula whereby the contractor is rewarded for performing at less than target costs or is penalized if it exceeds target cost.

(b) The profit or fee under the contract will vary inversely with the actual, allowable costs of performance and consequently is dependent on how effectively the contractor controls cost in the performance of the contract.

(c) The fixed-price cost incentive contract is one type of cost incentive contract. The parties establish at the outset a target cost, a target profit, a formula which provides a percentage increase or decrease of the target profit depending on whether the actual cost of performance is less than or exceeds the target cost, and a ceiling price. After performance of the contract, the actual cost of performance is arrived at based on the total incurred allowable costs as determined in accordance with subchapter 15 and as provided in the contract. The final contract price is then established in accordance with the formula using the actual cost of performance. The final contract price may not exceed the ceiling price. The contractor is obligated to complete performance of the contract, and, if actual costs exceed the ceiling price, the contractor suffers a loss.

The fixed-price cost incentive contract serves three objectives:

- (1) It permits the establishment of a firm ceiling price for performance of the contract which takes into account uncertainties and contingencies in the cost of performance;
- (2) It motivates the contractor economically since cost is in inverse relation to profit--the lower the cost, the higher the profit; and
- (3) It provides a flexible pricing mechanism for establishing a cost sharing responsibility between the State and contractor depending on

the nature of the goods, services, or construction being procured, the length of the contract performance, and the performance risks involved.

(d) The cost-reimbursement contract with cost incentive fee is another type of cost-incentive contract. The parties establish at the outset a target cost, a target fee, a formula for increase or decrease of fee depending on whether actual cost of performance is less than or exceeds the target cost, with maximum and minimum fee limitations, and a cost ceiling which represents the maximum amount which the agency is obligated to reimburse the contractor. The contractor continues performance until the work is complete or costs reach the ceiling specified in the contract. After performance is complete or costs reach the ceiling, the total incurred, allowable costs reimbursed in accordance with subchapter 15 and as provided in the contract are applied to the formula to establish the incentive fee payable to the contractor. This type of contract gives the contractor a stronger incentive to efficiently manage the contract than a cost-plus-fixed-fee contract provides.

(e) Prior to entering into any cost incentive contract, the procurement officer shall make the written determination required by subchapter 17.

(f) Prior to entering into any cost-reimbursement contract with cost incentive fee, the procurement officer shall make the written determination required by subsection 3-122-137(g). [Eff DEC 15 1995]
(Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-139 Performance incentive contract. (a) In a performance incentive contract, the parties establish at the outset a pricing basis for the contract, performance goals, and a formula which varies the profit or the fee if the specified performance goals are exceeded or not met.

(b) For example, early completion may entitle the contractor to a bonus while later completion may entitle the State to a price decrease.
[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-313)
(Imp: HRS §103D-313)

§3-122-140 Time and materials contract. (a) A time and materials contract provides an agreed basis
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for payment for materials supplied and labor performed.

(b) It shall, to the extent possible, contain a stated ceiling or an estimate that shall not be exceeded without prior agency approval.

(c) A time and materials contract shall be entered into only after the procurement officer determines in writing that:

- (1) Agency personnel have been assigned to closely monitor the performance of the work; and
- (2) In the circumstances, it would not be practicable to use any other type of contract to obtain needed goods, services, or construction, in the time required, and at the lowest cost or price to the purchasing agency. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-141 Labor hour contract. (a) A labor hour contract provides only for the payment of labor performed.

(b) It shall contain the same ceiling as provided in subsection 3-122-140(b).

(c) Prior to the award of the contract, the procurement officer shall make the determination as required in subsection 3-122-140(c).

[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-313)
(Imp: HRS §103D-313)

§3-122-142 Definite quantity contract. A definite quantity contract is a type of fixed-price contract that provides for delivery of a specified quantity of goods or services either at specified times or when ordered. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-143 Indefinite quantity contract. (a) An indefinite quantity contract is a type of fixed-price contract for an indefinite amount of goods or services to be furnished at specified times, or as ordered.

(b) The solicitation for an indefinite quantity contract:

- (1) Shall include an approximate quantity or the best information available as to quantity.
 - (2) May provide a minimum quantity the purchasing
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agency is obligated to order and may also provide for a maximum quantity provision that

limits the purchasing agency's obligation to order.

(c) A requirements contract is a type of indefinite quantity contract for goods or services that obligates the purchasing agency to order all the actual requirements of designated agencies during a specified period of time, and for the protection of the purchasing agency and the contractor, may include the following:

- (1) A provision which requires the purchasing agency and any other users named in the solicitation to order their actual requirements of the goods or services covered; and
- (2) A provision to reserve the right to take bids separately if a particular quantity requirement arises which exceeds the purchasing agency's normal requirements or an amount specified in the contract.

(d) There are two exemptions from ordering under requirements contract:

- (1) When the procurement officer approves a finding that the good or service under the contract will not meet a nonrecurring, special need of the purchasing agency; or
- (2) When goods are produced or services are performed incidental to the purchasing agency's own programs, as Hawaii correctional industries or Ho'opono workshop, that can satisfy the need. [Eff DEC 15 1995]
(Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-144 Incremental award contract. (a) An incremental award contract is a type of a definite quantity contract resulting from conditions under which it was either necessary or advantageous to award a contract to more than one supplier for the same item on a solicitation, or for similar items.

(b) An incremental award contract is a contract based on an award of portions of a definite quantity requirement to more than one contractor, and each portion is for a definite quantity and the sum of the portions is the total definite quantity required.

(c) This type of contract may be used only when

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awards to more than one bidder or offeror for different amounts of the same item are necessary to obtain the total quantity or the required delivery dates.

(d) If this type of contract is anticipated prior to issuing a bid or proposal, the State shall reserve the right to make an incremental award and the criteria for award shall be stated in the bid or proposal and the bid or proposal shall provide for separate-item bids on less than the full quantity or the total delivery.

(e) Evaluation and award shall be made by accepting prices and deliveries beginning with the most economical and progressing to higher offers until the full requirements are committed at the lowest overall cost available.

(f) Competitive sealed bidding, subchapter 5, is the conventional procurement method for establishing this type of contract, although competitive sealed proposals, small purchase procedures, and emergency procurements may be used if appropriate as determined in accordance with subchapters 6, 8, and 10.

(f) The procurement officer shall make a written determination setting forth the reasons for the incremental award, which shall be made a part of the procurement file. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-322) (Imp: HRS §103D-322)

§3-122-145 Multiple award contract. (a) A multiple award contract is a contract resulting from an award of an indefinite quantity requirement for one or more similar goods or services to more than one bidder or offeror when the State is obligated to order all of its actual requirements for the specified goods or services from those contractors.

(b) Multiple awards may be made when award to two or more bidders or offerors for similar products is necessary for adequate quantity delivery, service, or product compatibility.

(c) Multiple awards shall not be made:

- (1) When a single award will meet the State's needs without sacrifice of economy or service;
- (2) For the purpose of dividing the business;
- (3) For making available product or supplier selection to allow for user preference unrelated to utility or economy; or
- (4) For avoiding the resolution of the bids.

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(d) Multiple awards shall be limited to the least number of suppliers necessary to meet the valid requirements of using agencies.

(e) Competitive sealed bidding, subchapter 5, is the conventional procurement method for establishing the contracts, although competitive sealed proposals, small purchase procedures, and emergency procurements may be used if appropriate as determined in accordance with subchapters 6, 8 and 10.

(f) All eligible users of the contract shall be named in the bid or proposal, and it shall be mandatory that the actual requirements of the users that can be met under the contract be obtained in accordance with the contract, provided, that:

- (1) The State shall reserve the right to take bids separately if a particular quantity requirement arises which exceeds its normal requirement or an amount specified in the contract;
- (2) The State shall reserve the right to take bids separately if the chief procurement officer or the head of a purchasing agency approves a finding that the goods or services available under the contract will not meet a nonrecurring special need of the State; and
- (3) The contract shall allow the using agencies to procure goods produced, or services performed, incidental to the State's own programs, as correctional industries, when the goods or services satisfy the need.

(g) If a multiple award is anticipated prior to issuing a bid or proposal, the State shall reserve the right to make the award and the criteria for award shall be stated in the bid or proposal.

(h) The procurement officer shall make a written determination setting forth the reasons for a multiple award, which shall be made a part of the procurement file.

(i) A multiple award contract may also be awarded through a single competitive solicitation on a geographic or regional basis, pursuant to section 3-122-146. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-322) (Imp: HRS §103D-322)

§3-122-146 Geographic or regional award contract.

(a) Geographic or regional award contract is a type of multiple-award contract made when goods or services are §3-122-146

required to widely scattered locations or a particular requirement is of a local nature.

(b) Geographic regions may include:

- (1) Oahu as region 1, and further subdivided into leeward 1A, central Oahu-lower 1B, central Oahu-upper 1C, and windward 1D.
- (2) Maui as region 2, Hawaii as region 3, Kauai as region 4.
- (3) Those vendors that can provide goods, services, or construction anywhere in the State would be identified as region 5, or they may select one or more of the regions in paragraphs (1) and (2) depending on their capabilities.

(c) Geographic purchasing can be advantageous, or even necessary, for a number of reasons related to cost of transportation in terms of cost of the product or to the need for local service, and limits the purchases to firms located in the area involved and to firms which serve that area.

(d) Geographic bidding should not be used, however, where a larger contract can satisfy agencies requirements by more effective competition and at lower costs.

(e) If a regional award is anticipated prior to issuing a solicitation, the State shall reserve the right to make the award and the criteria for award shall be stated in the solicitation.

(f) The procurement officer shall make a written determination setting forth the reasons for a regional award, which shall be made a part of the procurement file. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-322) (Imp: HRS §§103D-322, 103D-904)

§3-122-147 Lease contract. (a) A lease is a contract for the use of goods under which title does not pass to the agency.

(b) A lease may be entered into provided:

- (1) It is in the best interest of the purchasing agency;
- (2) All conditions for renewal and costs of termination are set forth in the lease; and
- (3) The lease is not used to circumvent normal procurement procedures.

(c) The following lease arrangements are subject to the formal bid or proposal process:

- (1) Where the total expenditure for a lease for
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one year is \$10,000 or more;

- (2) Where a lease agreement contains an option to purchase and the total expenditure under this option including lease or rental payments is \$10,000 or more; or

- (3) Where total expenditure for a multi-year contract is \$10,000 or more, even though total annual expenditure is less than \$10,000.

(d) When the lease arrangement is subject to the formal bid or proposal process and an option to purchase is contemplated, an option to purchase provision shall be included in the solicitation. The provision shall provide that to exercise the option is at the purchasing agency's discretion only, and not subject to agreement or acceptance by the contractor. Before exercising the option the procurement officer shall:

- (1) Investigate alternative means of procuring comparable goods; and
- (2) Compare estimated costs and benefits associated with the alternative means and the exercise of the option, for example, the benefit of buying new state-of-the-art goods compared to the estimated, initial savings associated with exercise of a purchase option. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

§3-122-148 Installment purchase payment contract.

(a) Goods contracts may provide for purchase payments, including interest charges, over a period of time.

(b) Installment payments should be used judiciously in order to achieve economy and not to avoid budgetary restraints and shall be justified in writing by the head of the purchasing agency.

(c) Heads of purchasing agencies shall be responsible for ensuring that statutory or other prohibitions are not violated by use of installment provisions and that all budgetary, funding, or other required prior approvals are obtained.

(d) When used, a provision for installment payments shall be included in the solicitation document. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-313) (Imp: HRS §103D-313)

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§3-122-149 Multi-term contract. (a) A multi-term contract is appropriate:

- (1) When it is in the best interest of the State to obtain uninterrupted services extending over more than one fiscal period, where the performance of the services involves:

- (A) High start-up costs; or
 - (B) Where a changeover of service contractors involves both high phase-in and high phase-out costs during a transition period.
- (2) When special production requiring alteration in the contractor's facilities or operation involving high start-up costs, of definite quantities of goods for more than one fiscal period is necessary to best meet State needs but funds are available only for the initial fiscal period.
- (b) In a multi-term contract the contractual obligation of both parties in each fiscal period succeeding the first is subject to the appropriation and availability of funds therefor.
- (c) The contract shall provide that, in the event that funds are not available for any succeeding fiscal period, the remainder of the contract shall be cancelled and the contractor shall be reimbursed the reasonable value of any nonrecurring costs incurred but not amortized in the price of the goods delivered or services performed under the contract.
- (d) The objective of the multi-term contract is to promote economy and efficiency in procurement by:
- (1) Obtaining the benefits of sustained volume production and consequent low prices; and
 - (2) Increasing competitive participation in procurements which involve special production with consequent high start-up costs and in the procurement of services which involves high start-up costs or both high phase-in and high phase-out costs during changeover of service contractors.
- (e) The rules of this section apply only to contracts for goods or services described in subsection (a) and does not apply to any other contract including, but not limited to, contracts for construction and leases including leases of real property.
- (f) A multi-term contract may be used when it is determined in writing by the head of the purchasing agency that special production of definite quantities

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or the furnishing of long-term services are required to meet State needs and a multi-term contract will serve the best interests of the State by encouraging effective competition or otherwise promoting economies in State procurement. The following factors are among those relevant to this determination:

- (1) Firms which are not willing or able to compete because of high start-up costs or capital investment in facility expansion will be encouraged to participate in the competition when they are assured of recouping the costs during the period of contract performance;
- (2) Lower production costs because of larger quantity or service requirements, and substantial continuity of production or performance over a longer period of time, can be expected to result in lower unit prices;
- (3) Stabilization of the contractor's work force over a longer period of time may promote economy and consistent quality; or
- (4) The cost and burden of contract solicitation, award, and administration of the procurement may be reduced.

(g) An example of a situation which may be suitable for a multi-year contract is a trash removal contract where the contractor would have to buy trucks and other equipment solely to meet the State's requirements but the equipment would have useful life in excess of one year.

(h) The contract procedure for a multi-term contract is as follows:

- (1) The solicitation shall state:
 - (A) The amount of goods or services required for the proposed contract period;
 - (B) That a unit price shall be given for each good or service, and that the unit prices shall be the same throughout the contract, except to the extent price adjustment may be provided in the solicitation and resulting contract;
 - (C) That the multi-term contract will be cancelled only if funds are not appropriated or otherwise made available to support continuation of performance in any fiscal period succeeding the first; however, this does not affect either the State's rights or the

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contractor's rights under any termination clause of the contract;

- (D) That the head of the purchasing agency must notify the contractor on a timely basis that the funds are, or are not, available for the continuation of the

- contract for each succeeding fiscal period;
- (E) Whether bidders or offerors may submit prices for:
 - (i) The first fiscal period only;
 - (ii) The entire time of performance only; or
 - (iii) Both the first fiscal period and the entire time of performance;
 - (F) That a multi-term contract may be awarded and how the award will be determined including, if prices for the first fiscal period and the entire time of performance are submitted, how the prices will be compared; and
 - (G) That, in the event of cancellation as provided in subparagraph (C), the contractor will be reimbursed the unamortized, reasonably incurred, nonrecurring costs.
- (2) Award shall be made as stated in the solicitation and permitted under the source selection method utilized with care taken when evaluating multi-term prices against prices for the first fiscal period that award on the basis of prices for the period does not permit the successful bidder or offeror to "buy in", that is, give the bidder or offeror an undue competitive advantage in subsequent procurements.
- (3) Cancellation of a multi-term contract shall result when the head of the purchasing agency:
- (A) Notifies the contractor of nonavailability of funds for contract performance for any fiscal period subsequent to the first; or
 - (B) Fails to notify the contractor by the date set forth in the contract, unless the parties agree to extend the date, that funds are available for performance of the succeeding fiscal period and

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funds which may be used for the contract have not been appropriated or otherwise made available.

"Cancellation," as used in multi-term contracting, means the cancellation of the total requirements for the remaining portion of the contract because funds were not appropriated or otherwise made available.

The contract for the first fiscal period shall not be cancelled.

These provisions on cancellation of multi-term contracts do not limit the rights of the State or the contractor under any termination clause of the contract if the contract is terminated pursuant to that clause rather than cancelled as provided in this subsection. [Eff DEC 15 1995]
(Auth: HRS §103D-202) (Imp: HRS §103D-315)

§§3-122-150 to 3-122-154 (Reserved).

SUBCHAPTER 17

APPROVAL OF ACCOUNTING SYSTEM

§3-122-155 Approval of accounting system. Except with respect to firm fixed-price contracts, no contract shall be used unless it has been determined in writing by the chief procurement officer, the head of a purchasing agency, or a designee of either officer that:

- (1) The proposed contractor's accounting system will permit timely development of all necessary cost data in the form required by the specific contract type contemplated; and
- (2) The proposed contractor's accounting system is adequate to allocate costs in accordance with generally accepted accounting principles. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-314)

§§3-122-156 to 3-122-165 (Reserved)

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SUBCHAPTER 18

RIGHT TO INSPECT PLANT

§3-122-166 Inspection of plant or site. Circumstances under which the State may perform inspections include, but are not limited to,

inspections of the contractor's plant or site in order to determine:

- (1) Whether the standards set forth in section 3-122-108 have been met or are capable of being met; and
- (2) If the contract is being performed in accordance with its terms.
[Eff DEC 15 1995] (Auth: HRS §103D-202)
(Imp: HRS §103D-316)

§3-122-167 Access to plant or place of business.
The State may enter a contractor's or subcontractor's plant or place of business to:

- (1) Inspect goods or services for acceptance by the State pursuant to the terms of a contract;
- (2) Audit cost or pricing data or audit the books and records of any contractor or subcontractor pursuant to section 3-122-175; and
- (3) Investigate in connection with an action to debar or suspend a person from consideration for award of contracts pursuant to sections 3-126-11 through 3-126-18.
[Eff DEC 15 1995] (Auth: HRS §103D-202)
(Imp: HRS §103D-316)

§3-122-168 Inspection and testing of goods and services. (a) State contracts may provide that the State may inspect supplies and services at the contractor or subcontractor's facility and perform tests to determine whether they conform to solicitation requirements, or after award, to contract requirements, and are therefore acceptable. The inspections and test shall be conducted in accordance with the terms of the solicitation and contract.

(b) The chief procurement officer may establish operational procedures governing the testing and trial

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use of equipment, materials, and other supplies by any state agency, and the application of resulting information and data to specifications or procurements.
[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-316)

§3-122-169 Conduct of inspections. (a)
Inspections or tests shall be performed so as not to

unduly delay the work of the contractor or subcontractor. No inspector other than the procurement officer may change any provision of the specifications or the contract without written authorization of the procurement officer. The presence or absence of an inspector shall not relieve the contractor or subcontractor from any requirements of the contract.

(b) When an inspection is made in the plant or place of business of a contractor or subcontractor, the contractor or subcontractor shall provide without charge all reasonable facilities and assistance for the safety and convenience of the person performing the inspection or testing.

(c) Inspection or testing of supplies and services performed at the plant or place of business of any contractor or subcontractor shall be performed at reasonable times. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-316)

§3-122-170 Inspection of construction projects.
On-site inspection of construction shall be performed in accordance with the terms of the contract.
[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-316)

§§3-122-171 to 3-122-174 (Reserved).

SUBCHAPTER 19

RIGHT TO AUDIT RECORDS

§3-122-175 Statutory authority to audit.
Pursuant to section 103D-317, HRS, the State may, at reasonable times and places, audit the books and records of a contractor, prospective contractor,

§3-122-175

subcontractor, or prospective subcontractor which are related to:

- (1) The cost or pricing data submitted under sections 3-122-122 through 3-122-130, and
- (2) A state contract, including subcontracts, other than a firm fixed-price contract, awarded pursuant to subchapters 5 through 10.
[Eff DEC 15 1995] (Auth: HRS §103D-202)
(Imp: HRS §103D-317)

§3-122-176 Auditors' audit reports. Audits requested under this subchapter shall be performed by the office of the chief procurement officer, the head of a purchasing agency, or an independent auditor. An audit report shall be prepared in accordance with section 3-122-178 or section 3-122-180. The report shall be made available to the party audited upon request. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-317)

§3-122-177 Cost or pricing data audit. (a) The chief procurement officer, head of a purchasing agency, or a designee of either officer may require an audit of cost or pricing data submitted under section 3-122-125.

(b) An audit should be required when in respect to the contractor, prospective contractor, subcontractor, or prospective subcontractor, there is:

- (1) A question as to the adequacy of accounting policies or cost systems;
- (2) A substantial change in the methods or levels of operation;
- (3) Previous unfavorable experience indicating doubtful reliability of estimating, accounting, or purchasing methods;
- (4) A lack of cost experience due to the procurement of a new supply or service; or
- (5) Other evidence that an audit is in the State's best interests as determined by the chief procurement officer, head of the purchasing agency, or a designee of either officer. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-317)

§3-122-178 Cost or pricing data audit report.
(a) When the chief procurement officer, the head of a

§3-122-179

purchasing agency , or a designee of either officer requires an audit under section 3-122-177, the auditor shall submit a written report to the officer by an agreed upon date.

(b) Subject to final determination by the auditor, the report should contain the following in respect to the contractor, prospective contractor, subcontractor, or prospective subcontractor:

- (1) A description of the original proposal and all submissions of cost or pricing data;
- (2) An explanation of the basis and the method used in preparing the proposal;

- (3) A statement identifying any cost or pricing data not submitted but examined by the auditor which has a significant effect on the proposed cost or price;
 - (4) A description of any deficiency in the cost or pricing data not submitted and an explanation of its effect on the proposal;
 - (5) A statement summarizing those major points where there is a disagreement as to the cost or pricing data submitted; and
 - (6) A statement identifying any information obtained from other sources.
- [Eff DEC 15 1995] (Auth: HRS §103D-202)
(Imp: HRS §103D-317)

§3-122-179 Contract audit. (a) Under the authority of section 3-122-175, the type of contract under which books and records should be audited is that in which price is based on costs or is subject to adjustment based on costs, or that in which auditing would be appropriate to assure satisfactory performance, as a time and materials contract.

(b) The requirement of a contract audit may be warranted when a question arises in connection with:

- (1) The financial condition, integrity, and reliability of the contractor or subcontractor;
- (2) Any prior audit experience;
- (3) The adequacy of the contractor's or subcontractor's accounting system;
- (4) The number or nature of invoices or reimbursement vouchers submitted by the contractor or subcontractor for payment;
- (5) The use of federal assistance funds;
- (6) The fluctuation of market prices affecting

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the contract; or

- (7) Any other situation when the procurement officer finds that an audit is necessary for the protection of the State's interest.

(c) The scope of the audit may be limited by the chief procurement officer, the head of the purchasing agency, or a designee of either officer.

[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-317)

§3-122-180 Contract audit report. Where the chief procurement officer, head of a purchasing agency,

or a designee of either officer requires a contract audit under section 3-122-179, the auditor shall submit a written report to the officer by an agreed upon date. The scope of the report will depend on the scope of the audit ordered. However, the report should contain specific reference to the terms of the contract to which the audited data relate and a statement of the degree to which the auditor believes the audited data evidence compliance with those terms.

[Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-317)

§3-122-181 Retention of books and records. (a) Any contractor who receives a contract, change order, or contract modification for which cost or pricing data are required shall maintain the books and records that relate to the cost or pricing data for three years from the date of final payment under the contract.

(b) Books and records that relate to a state contract, including subcontracts, other than a firm fixed-price contract, awarded under any method set forth in section 3-122-175 shall be maintained:

- (1) By a contractor, for three years from the date of final payment under the price contract; and
 - (2) By a subcontractor, for three years from the date of final payment under the subcontract.
- [Eff DEC 15 1995] (Auth: HRS §103D-202)
(Imp: HRS §103D-317)

§§3-122-182 to 3-122-185 (Reserved).

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SUBCHAPTER 20

FINALITY OF DETERMINATIONS

§3-122-186 Finality of determinations. The determinations required by sections 3-122-31, 3-122-48, 3-122-57, 3-122-82, 3-122-90, 3-122-112, 3-122-124, 3-122-133, and 3-122-155 shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-318)

§§3-122-187 to 3-122-190 (Reserved).

SUBCHAPTER 21

REPORTING OF ANTICOMPETITIVE PRACTICES

§3-122-191 Anticompetitive practices. For the purposes of these rules, an anticompetitive practice is a practice among bidders or offerors which reduces or eliminates competition or restrains trade. An anticompetitive practice can result from an agreement or understanding among competitors to restrain trade as submitting collusive offers, or result from illicit business actions which have the effect of restraining trade, as controlling the resale price of products or an improper collective refusal to submit an offer. Indications of suspected anticompetitive practices include, but are not limited to, identical offers, rotated low offers, sharing of the business, "tie-in" sales, resale price maintenance, and group boycotts. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-319)

§3-122-192 Independent price determination. Every solicitation shall provide that by submitting an offer, the offeror certifies that the price submitted was independently arrived at without collusion. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-319)

§3-122-193

§3-122-193 Detection of anticompetitive practices. In order to assist in ascertaining whether or not an anticompetitive practice may have occurred or may be occurring, the procurement officer should be alert and sensitive to conditions of the market place and will often find it necessary to perform the following, as appropriate:

- (1) Study the pricing history of a good, service, or construction item over a period of time sufficient to determine any significant pricing patterns or changes;
- (2) Review similar state contract awards over a period of time; or
- (3) Consult with outside sources of information, as offerors who have competed for similar state business in the past but who are no longer competing for the business.

§3-122-194 Identical bidding and price fixing.

(a) The term "identical bidding" means the submission by offerors of the same total price or the same price on a particular line item. The submission of identical offers may or may not signify the existence of collusion. In some instances, price controls imposed by state or federal governments result in the submission of identical offers. Identical offers for supplies are more likely to occur in the absence of collusion if:

- (1) The supply is a commodity with a well-established market price or a brand name with a "suggested retail price;"
- (2) The quantity being purchased is small in relation to the supplier's total sales;
- (3) Early delivery is required; or
- (4) Transportation expenses are low relative to total costs.

(b) In seeking to determine whether collusion has taken place, the procurement officer should view the identical offers against present and past pricing policies of the bidders or offerors, the structure of the industry involved including comparisons of prices f.o.b. shipping point and f.o.b. destination, and the nature of the supply, service, or construction involved, as whether it is a basic chemical or metal. Identical offers may also result from resale price

§3-122-195

maintenance agreements which are described in section 3-122-83. Any other attempt by offerors to fix prices should also be reported. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-319)

§3-122-195 Other anticompetitive practices. (a)

The practices which are described in this section and which the procurement officer suspects might be anticompetitive shall be reported in accordance with section 3-122-196.

(b) Rotated low offers result where all offerors participating in the collusive scheme submit offers and by agreement, alternate being the lowest offeror. To aid in determining whether rotation may be occurring, the procurement officer should review past similar procurements in which the same offerors have participated.

(c) The practice of resale price maintenance consists of an agreement between a manufacturer and a distributor or a dealer to fix the resale price of a good. A procurement officer should consider the possibility that an agreement exists where prices offered adhere to an established pattern, as a published price schedule, and when identical bidding occurs.

(d) Sharing of the business occurs where potential offerors allocate business among themselves based on the customers or the territory involved. Thus, a procurement officer might discover that a potential offeror is not participating in a state procurement because a particular state agency, or a particular territory, has not been allocated to the offeror by the producer or manufacturer.

(e) "Tie-in" sales are those in which an offeror attempts to sell one good or service only upon the condition that the procurement officer purchase another particular good or service.

(f) A group boycott results from an agreement between competitors not to deal with another competitor or not to participate in, for instance, a state procurement until the boycotting competitors' conditions are met by the boycotted competitor or the State. The boycott of a competitor by other competitors may have an effect on the market structure or price of a good, service, or construction item needed by the State. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-319)

§3-122-196

§3-122-196 Reporting suspected anticompetitive practices. The chief procurement officer, in consultation with the respective attorney general or corporation counsel, shall develop procedures, including forms, for reporting suspected anticompetitive practices. A procurement officer who suspects that anticompetitive practice has occurred or may be occurring shall follow these procedures. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-319)

§§3-122-197 to 3-122-200 (Reserved).

SUBCHAPTER 22

RETENTION OF PROCUREMENT RECORDS

§3-122-201 Retention of procurement records. All procurement records shall be retained and disposed of in accordance with chapter 94, HRS, and records retention guidelines and schedules approved by the comptroller. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-320)

§§3-122-202 to 3-122-210 (Reserved).

SUBCHAPTER 23

RECORD OF PROCUREMENT ACTIONS

§3-122-211 Record of procurement actions. (a) The chief procurement officer shall maintain a record of all purchases made under sections 103D-102(b)(4), 103D-304, 103D-306, and 103D-307 for a minimum of five years. The record shall contain:

- (1) Each contractor's name;
- (2) The amount and type of each purchase; and
- (3) A listing of the goods, services, or construction procured.

(b) A copy of the record shall be submitted to the legislature on an annual basis following the close of the fiscal year. The record shall be available for

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public inspection.

(c) The chief procurement officer shall submit the record to the administrator of the state procurement office by August 15 to be consolidated and forwarded to the legislature by October 1. An information copy shall also be provided to the procurement policy board. [Eff DEC 15 1995] (Auth: HRS §103D-202) (Imp: HRS §103D-321)

§§3-122-212 to 3-122-220 (Reserved).

SUBCHAPTER 24

BID SECURITY, CONTRACT PERFORMANCE AND PAYMENT BONDS

§3-122-221 General. (a) The term "bid security", as used in this subchapter means security provided at the time an offer is submitted.

(b) Bid security protects the State against the failure or refusal of the low offeror to supply the necessary performance and payment bonds, as required, and to proceed with performance under the contract.

(b) A contract performance bond indemnifies the State against loss resulting from the failure of the contractor to perform a contract, in particular a construction contract, in accordance with the plans and specifications.

(c) A contract payment bond guarantees payment and protection for those furnishing labor and materials to the contractor or its subcontractors for the work bonded. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-323, 103D-324) (Imp: HRS §§103D-323, 103D-324)

§3-122-222 Acceptable bid security, contract performance and payment bonds. Acceptable bid security and contract performance and payment bonds, pursuant to section 103D-302 and 103D-303, HRS, shall be limited to:

- (1) Surety bond underwritten by a company licensed to issue bonds in this State;
- (2) Legal tender; or
- (3) A certificate of deposit; share certificate; or cashier's, treasurer's, teller's, or official check drawn by, or a certified check

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accepted by a bank, a savings institution, or credit union insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration, and payable at sight or unconditionally assigned to the procurement officer advertising for offers. These instruments may be utilized only to a maximum of \$100,000. If the required security or bond amount totals over \$100,000, more than one instrument not exceeding \$100,000 each and issued by different financial institutions shall be accepted.

[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-323, 103D-324) (Imp: HRS §§103D-323, 103D-324)

§3-122-223 Bid security. (a) Bid security shall be required for:

- (1) Construction contracts when the price offered is \$25,000 or more;

- (2) Construction contracts less than \$25,000 when the head of a purchasing agency has secured the approval of the chief procurement officer;
 - (3) Goods and services contracts when the head of a purchasing agency has secured the approval of the chief procurement officer; and
 - (4) Federally funded contracts wherein the conditions of the funding requires performance or payment bonds or both.
- (b) Bid security, when required, shall be in an amount equal to at least five per cent of the amount of the offer or in an amount required by the terms of the federal funding.
- (c) If a contractor fails to accompany its offer with the bid security when required, the offer shall then be deemed nonresponsive in accordance with the definition of "responsive bidder or offeror" in section 3-120-3, except as provided by subsection (d).
- (d) If an offer does not comply with the security requirements of this subchapter, the offer shall be rejected as nonresponsive, unless the failure to comply is determined by the chief procurement officer, the head of a purchasing agency, or a designee of either officer, to be nonsubstantial where:
- (1) Only one offer is received, and there is not sufficient time to resolicit the contract;

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- (2) The amount of the bid security submitted, though less than the amount required by the solicitation, is equal to or greater than the difference in the price stated in the next higher acceptable offer; or
 - (3) The bid security becomes inadequate as a result of the correction of a mistake in the offer or offer modification in accordance with section 3-122-31, if the offeror increases the amount of security to required limits within the time established by the procurement officer.
- (e) When it is determined that failure to comply with required bid security is nonsubstantial, the chief procurement officer, the head of a purchasing agency, or a designee of either officer shall indicate the reasons for that determination in writing and a copy of the determination shall be kept in the contract file and made available to the public upon request.
- [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-323)
(Imp: HRS §103D-323)

§3-122-224 Contract performance and payment bonds. (a) Performance and payment bonds shall be required for:

- (1) Construction contracts when the price of the contract is \$25,000 or more;
- (2) Construction contracts less than \$25,000 when the head of the purchasing agency has secured the approval of the chief procurement officer;
- (3) Goods or services contracts when the head of the purchasing agency has secured the approval of the chief procurement officer; and
- (4) Federally funded contracts wherein the conditions of the funding requires a performance or payment bond or both.

(b) The amounts of the performance and payment bonds, when required, shall be as follows:

- (1) For construction contracts, performance and payment bonds shall each be in an amount equal to one hundred per cent of the amount of the contract price;
- (2) For goods and services contracts, performance and payment bonds shall each be in an amount not to exceed fifty per cent of the amount of

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the contract price;

- (3) For contracts where contract price cannot be determined at the time of award, the amounts of the performance and payment bonds shall each be stated in the solicitation; and
- (4) For federally funded contracts, performance or payment bond or both shall each be in amount required by the terms of the federal funding.

(c) The performance and payment bonds, if required, shall be delivered by the contractor to the State at the same time the contract is executed. If the contractor fails to deliver the required performance and payment bonds, the contractor's award shall be cancelled, its bid security enforced, and award of the contract shall be made to the next lowest offeror in accordance with subchapter 11.
[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-324)
(Imp: HRS §103D-324)

§3-122-225 Reduction of contract performance and payment bond amounts prior to solicitation. (a) Prior to solicitation, the amounts of a performance bond and

a payment bond may be reduced, provided that the chief procurement officer or head of a purchasing agency approves a written determination.

(b) For construction contracts only, reduction of performance bond amount shall be limited to not less than fifty per cent of the contract price if, after completing appropriate analysis, it is determined to be less costly or more advantageous to the State to self-insure a part of the performance of the contractor. An analysis may be made for groups of contracts, for example, contracts in excess of \$100 million, or may be made on particular contracts, as the chief procurement officer or the head of a purchasing agency chooses. A copy of the analysis shall be available for public inspection.

(c) For construction contracts only, reduction of payment bond amount shall be limited to not less than fifty per cent of the contract price if a written determination is made that it is in the best interest of the State to do so. Factors to be considered in order to make a determination include, but are not limited to the value and number of subcontracts to be awarded by the contractor and the value of the

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contract. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-324) (Imp: HRS §103D-324)

§3-122-226 Reduction of contract performance and payment bond amounts during performance. (a) If permitted by the contract and solicitation, the chief procurement officer or head of a purchasing agency may reduce the amount of the performance bond as work is completed if the officer determines in writing that the reduction is in the best interest of the State.

(b) During performance, the chief procurement officer or head of a purchasing agency may reduce the required coverage of the payment bond as payments are made by the contractor. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-324) (Imp: HRS §103D-324)

§3-122-227 Payment claims against the bond. (a) Any person or entity who has furnished labor or material to the contractor for the work provided in the contract, for which a payment bond is furnished under this section, and who has not been paid in full after two months from the completion and final settlement of any contract, may institute an action against the

contractor or the contractor and its sureties, and have their rights and claims adjudicated in the action, and judgment rendered thereon; subject to the State's priority on its performance security.

(b) If the full amount of the liability of the contractor or the contractor and its sureties on the security is insufficient to pay the full amount of the claims, then, after paying the full amount due the State, the remainder shall be distributed pro rata among the claimants.

(c) Every suit instituted upon a payment bond shall be brought in the circuit court of the circuit in which the contract was to be performed, but no suit shall be commenced after the expiration of one year after the completion and final settlement of the contract. The obligee named in the bond need not be joined as a party in any suit. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-324) (Imp: HRS §103D-324)

§3-122-228 Bond forms. (a) The required bond forms for bid security, performance, payment, and

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combination performance and payment bonds shall be in conformance with sections 3-122-221, 3-122-222, and 3-122-227 and shall be substantially as provided in the exhibits located at the end of this chapter or as modified by the administrator of the state procurement office. The bond forms are as follows:

- (1) For bid security (surety bond): exhibit titled "Surety [Bid] [Proposal] Bond", dated 11/7/95.
- (2) For performance bond:
 - (A) Performance bond (surety): exhibit titled "Performance Bond (Surety)", dated 11/7/95; and
 - (B) Performance bond for types of bonds submitted pursuant to paragraphs 3-122-222(2) and (3): exhibit titled "Performance Bond", dated 11/7/95.
- (3) For payment bond:
 - (A) Labor and material payment bond (surety): exhibit titled "Labor and Material Payment Bond (Surety)", dated 11/7/95; and
 - (B) Labor and material payment bond for types of bonds submitted pursuant to paragraphs 3-122-222(2) and (3):

exhibit titled "Labor and Material Payment Bond", dated 11/7/95.

- (4) For combination performance and payment bond: performance and payment bond: exhibit titled "Combination Performance and Payment Bond", dated 11/7/95.
- (5) For use with performance and payment bonds: exhibit titled "Contractor Acknowledgement", dated 11/7/95.
- (6) For use with surety performance and payment bonds: exhibit titled "Surety Acknowledgement", dated 11/7/95.

(b) Certified copies of bonds may be requested and obtained from the State upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond shall be prima facie evidence of the contents, execution, and delivery of the original. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-325) (Imp: HRS §103D-325)

§§3-122-229 to 3-122-240 (Reserved).

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SUBCHAPTER 25

FISCAL RESPONSIBILITY

§3-122-241 Fiscal responsibility. Every contract modification, change order, or contract price adjustment under a contract shall be subject to prior written certification by the appropriate fiscal officer for funding the project or the contract, as to the effect of the contract modification, change order, or adjustment in contract price on the total project budget or the total contract budget. In the event that the certification of the fiscal officer discloses a resulting increase in the total project budget or the total contract budget, the procurement officer shall not execute or make contract modification, change order, or adjustment in contract price unless sufficient funds are available therefor, or the scope of the project or contract is adjusted so as to permit the degree of completion that is feasible within the total project budget or total contract budget as it existed prior to the contract modification, change order, or adjustment in contract price under consideration; provided, that with respect to the validity, as to the contractor, of any executed

contract modification, change order, or adjustment in contract price which the contractor has reasonably relied upon, it shall be presumed that there has been compliance with this section. [Eff DEC 15 1995]
(Auth: HRS §103D-326) (Imp: HRS §103D-326)

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Chapter 3-122, Hawaii Administrative Rules, on the Summary Page dated November 7, 1995, was adopted on November 7, 1995, following a public hearing held on September 21, 1995 in Kailua-Kona, Hawaii; September 22, 1995 in Hilo, Hawaii; September 26, 1995 in Honolulu, Hawaii; October 10, 1995 in Wailuku, Maui; and on October 20, 1995 in Lihue, Kauai, after public notice was given in the Hawaii Tribune-Herald, West Hawaii Today, The Maui News, and The Garden Island on August 21, 1995, and in The Honolulu Advertiser on August 22, 1995.

The adoption of chapter 3-122 shall take effect ten days after filing with the Office of the Lieutenant Governor.

Haruo Shigezawa
Chairperson
Procurement Policy Board

Sam Callejo
State Comptroller

APPROVED:

Benjamin J. Cayetano
Governor
State of Hawaii

Dated: _____

APPROVED AS TO FORM:

Deputy Attorney General

Filed

EXHIBIT

PROCUREMENTS APPROVED FOR SOLE SOURCE
(11/7/95)

The following procurements are not subject to the
chief procurement officer's approval:

Sole
Source
Number

Sole Source

1. Rental of booth space for exhibits at
conventions and trade shows when organized by
a single sponsor.

Criteria: When rental is available only
through a single organizer or sponsor of the
convention or trade show

EXHIBIT

SURETY [BID] [PROPOSAL] BOND
(11/7/95)

Bond No. _____

KNOW ALL MEN BY THESE PRESENTS:

That we, [Full name or legal title of bidder] as Principal, hereinafter called the Principal, and [Bonding company], a corporation duly licensed for the purpose of making, guaranteeing, or becoming sole surety upon bonds or undertakings required or authorized by the laws of the State of Hawaii, as Surety, hereinafter called the Surety, are held and firmly bound unto [State/county entity], as Owner, in the penal sum of [Required amount of bid security] dollars (\$_____), lawful money of the United States of America, for the payment of which sum well and truly to be made, the said Principal and the said Surety bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS:

The Principal has submitted an offer for [Project by number and brief description].

NOW, THEREFORE:

The condition of this obligation is such that if the [State/county entity] shall reject said offer, or in the alternate, accept the offer of the Principal and the Principal shall enter into a Contract with the [State/county entity] in accordance with the terms of such offer, and give such bond or bonds as may be specified in the solicitation or Contract Documents with good and sufficient surety for the faithful performance of such Contract and for the prompt payment of labor and material furnished in the prosecution thereof as specified in the solicitation then this obligation shall be null and void, otherwise to remain in full force and effect.

Signed this _____ day of _____, 19____.

(Principal)

By _____
Its

(Surety)

By _____
Its Attorney-in-Fact

EXHIBIT

PERFORMANCE BOND (SURETY)
(11/7/95)

KNOW ALL MEN BY THESE PRESENTS:

That _____
(full legal name and street address
of Principal)

as Principal, (hereinafter referred to as "Principal"),
and _____,
(name and street address of bonding company)

as Surety, (hereinafter referred to as "Surety"), a
corporation(s) authorized to transact business as a
surety in the State of Hawaii, are held and firmly
bound unto the _____,
(State/County entity)

its successors and assigns, (hereinafter referred to as
"Obligee"), in the amount of _____

DOLLARS (\$_____), to which payment
Principal and Surety bind themselves, their heirs,
executors, administrators, successors and assigns,
jointly and severally, firmly by these presents.

WHEREAS, the above-bound Principal has entered
into a Contract with Obligee dated _____
for _____

(hereinafter referred to as the "Contract"), which
Contract is incorporated herein by reference and made a
part hereof.

NOW THEREFORE, the condition of this obligation is
such that:

If the Principal shall promptly and faithfully perform, and fully complete the Contract in strict accordance with the terms of the Contract as said Contract may be modified or amended from time to time; then this obligation shall be void; otherwise to remain in full force and effect.

Surety to this Bond hereby stipulates and agrees that no changes, extensions of time, alterations, or additions to the terms of the Contract, including the work to be performed thereunder, and the specifications or drawings accompanying same, shall in any way affect its obligation on this bond, and it does hereby waive notice of any such changes, extensions of time, alterations, or additions, and agrees that they shall become part of the Contract.

In the event of Default by the Principal, of the obligations under the Contract, then after written Notice of Default from the Obligee to the Surety and the Principal, Surety shall either remedy the Default, or take over the work to be performed under the Contract and complete such work, subject, however, to the limitation of the penal sum of this bond.

Signed and sealed this ____ day of _____, 199__.

Principal Seal

By its _____

By its _____

Surety Seal

By its _____

By its _____

ALL SIGNATURES MUST BE ACKNOWLEDGED
BY A NOTARY PUBLIC

EXHIBIT

PERFORMANCE BOND

(11/7/95)

KNOW ALL MEN BY THESE PRESENTS:

That we, _____
(full legal name and street address
of Contractor)

as principal, hereinafter called Contractor, is held
and firmly bound unto _____,
(State/County entity)

its successors and assigns, as Obligee, hereinafter
called Obligee, in the amount of _____

(Dollar amount of contract)

DOLLARS (\$_____), lawful money of the
United States of America, for the payment of which to
the said Obligee, well and truly to be made, Contractor
binds itself, its heirs, executors, administrators,
successors and assigns, firmly by these presents. Said
amount is evidenced by:

 / Legal tender;

 / Share Certificate unconditionally assigned to
or made payable at sight to _____;
_____;

Description _____;
_____;

 / Certificate of Deposit, No. _____,
dated _____ issued by _____,
_____;
drawn on _____,
a bank, savings institution or credit union
insured by the Federal Deposit Insurance
Corporation or the National Credit Union
Administration, payable at sight or
unconditionally assigned to _____;
_____;

/ Cashier's Check No. _____, dated
_____, drawn on _____

_____,
a bank, savings institution or credit union
insured by the Federal Deposit Insurance
Corporation or the National Credit Union
Administration, payable at sight or
unconditionally assigned to _____;
_____;

 / Teller's Check No. _____, dated
_____, drawn on _____

_____,
a bank, savings institution or credit union
insured by the Federal Deposit Insurance
Corporation or the National Credit Union
Administration, payable at sight or
unconditionally assigned to _____;
_____;

 / Treasurer's Check No. _____, dated
_____, drawn on _____

_____,
a bank, savings institution or credit union
insured by the Federal Deposit Insurance
Corporation or the National Credit Union
Administration, payable at sight or
unconditionally assigned to _____;
_____;

 / Official Check No. _____, dated
_____, drawn on _____

_____,
a bank, savings institution or credit union
insured by the Federal Deposit Insurance
Corporation or the National Credit Union
Administration, payable at sight or
unconditionally assigned to _____;
_____;

 / Certified Check No. _____, dated
_____, accepted by a bank, savings
institution or credit union insured by the
Federal Deposit Insurance Corporation or the
National Credit Union Administration, payable

at sight or unconditionally assigned to _____;
_____;

2

WHEREAS:

The Contractor has by written agreement dated _____ entered into a contract with Obligee for the following Project: _____

which is hereinafter referred to as the Contract.

NOW, THEREFORE,

The condition of this obligation is such that, if Contractor shall promptly and faithfully perform the Contract in accordance with, in all respects, the stipulations, agreements, covenants and conditions of the Contract as it now exists or may be modified according to its terms, and shall deliver the Project to the Obligee, or to its successors or assigns, fully completed as in the Contract specified and free from all liens and claims and without further cost, expense or charge to the Obligee, its officers, agents, successors or assigns, free and harmless from all suits or actions of every nature and kind which may be brought for or on account of any injury or damage, direct or indirect, arising or growing out of the doing of said work or the repair or maintenance thereof or the manner of doing the same or the neglect of the Contractor or its agents or servants or the improper performance of the Contract by the Contractor or its agents or servants or from any other cause, then this obligation shall be void; otherwise it shall be and remain in full force and effect.

AND IT IS HEREBY STIPULATED AND AGREED that suit on this bond may be brought before a court of competent jurisdiction without a jury, and that the sum or sums

specified in the said Contract as liquidated damages, if any, shall be forfeited to the Obligee, its successors or assigns, in the event of a breach of any, or all, or any part of, the covenants, agreements, conditions, or stipulations contained in the Contract or in this bond in accordance with the terms thereof.

The amount of this bond may be reduced by and to the extent of any payment or payments made in good faith hereunder.

3

Signed and sealed this ____ day of _____, 199__.

Contractor Seal

By _____
Its

By _____
Its

*ALL SIGNATURES MUST BE ACKNOWLEDGED
BY A NOTARY PUBLIC

EXHIBIT

LABOR AND MATERIAL PAYMENT BOND (SURETY)
(11/7/95)

KNOW ALL MEN BY THESE PRESENTS:

That _____
(full legal name and street address
of Principal)

as Principal (hereinafter referred to as "Principal"),

and _____,
(name and street address of bonding company)

as Surety (hereinafter referred to as "Surety"), a
corporation(s) authorized to transact business as a
surety in the State of Hawaii, are held and firmly
bound unto the _____,
(State/County entity)

its successors and assigns, (hereinafter referred to as
"Obligee"), in the amount of _____

_____ Dollars (\$_____), to which payment
Principal and Surety bind themselves, their heirs,
executors, administrators, successors and assigns,
jointly and severally, firmly by these presents.

WHEREAS, the above-bound Principal has entered
into a Contract with Obligee dated _____
for _____

(hereinafter referred to as the "Contract"), which
Contract is incorporated herein by reference and made a
part hereof.

NOW THEREFORE, the condition of this obligation is
such that if the Principal shall promptly make payment
to any Claimant, as hereinafter defined, for all labor
and materials supplied to the Principal for use in the
performance of the Contract, then this obligation shall
be void; otherwise to remain in full force and effect.

1. Surety to this Bond hereby stipulates and agrees that no changes, extensions of time, alterations, or additions to the terms of the Contract, including the work to be performed thereunder, and the specifications or drawings accompanying same, shall in any way affect its obligation on this bond, and it does hereby waive notice of any such changes, extensions of time, alterations, or additions, and agrees that they shall become part of the Contract.

2. A "Claimant" shall be defined herein as any person who has furnished labor or materials to the Principal for the work provided in the Contract.

As provided in Section 103D-324, Hawaii Revised Statutes, every Claimant who has not been paid in full after two months from the completion and final settlement of the Contract may institute an action against the Principal and its Surety and have the rights adjudicated in the action, and judgment rendered thereon; subject to the Obligee's priority on the performance bond. If the full amount of the liability of the Surety on the bond is insufficient to pay the full amount of the claims, then after paying the full amount due the Obligee, the remainder shall be distributed pro rata among the claimants.

Signed and sealed this _____ day of _____, 199____.

Principal Seal

By its _____

By its _____

Surety Seal

By its _____

By its _____

ALL SIGNATURES MUST BE ACKNOWLEDGED
BY A NOTARY PUBLIC

EXHIBIT

LABOR AND MATERIAL PAYMENT BOND
(11/7/95)

KNOW ALL MEN BY THESE PRESENTS:

That we, _____
(full legal name and street address
of Contractor)

as principal, hereinafter called Contractor, is held
and firmly bound unto _____,
(State/County entity)

its successors and assigns, as Obligee, hereinafter
called Obligee, in the amount of _____

(Dollar amount of contract)

DOLLARS (\$_____), lawful money of the
United States of America, for the payment of which to
the said Obligee, well and truly to be made, Contractor
binds itself, its heirs, executors, administrators,
successors and assigns, firmly by these presents. Said
amount is evidenced by:

 / Legal tender;

 / Share Certificate unconditionally assigned to
or made payable at sight to _____

Description _____
_____;

 / Certificate of Deposit, No. _____, dated
_____ issued by _____

,
drawn on _____,
a bank, savings institution or credit union
insured by the Federal Deposit Insurance
Corporation or the National Credit Union
Administration, payable at sight or
unconditionally assigned to _____
_____;

___/ Cashier's Check No. _____, dated
_____, drawn on _____

,
a bank, savings institution or credit union
insured by the Federal Deposit Insurance
Corporation or the National Credit Union
Administration, payable at sight or
unconditionally assigned to _____;

___/ Teller's Check No. _____, dated
_____, drawn on _____

,
a bank, savings institution or credit union
insured by the Federal Deposit Insurance
Corporation or the National Credit Union
Administration, payable at sight or
unconditionally assigned to _____;

___/ Treasurer's Check No. _____, dated
_____, drawn on _____

,
a bank, savings institution or credit union
insured by the Federal Deposit Insurance
Corporation or the National Credit Union
Administration, payable at sight or
unconditionally assigned to _____;

___/ Official Check No. _____, dated
_____, drawn on _____

,
a bank, savings institution or credit union
insured by the Federal Deposit Insurance
Corporation or the National Credit Union
Administration, payable at sight or
unconditionally assigned to _____;

The condition of this obligation is such that, if Contractor shall promptly and faithfully perform the Contract in accordance with, in all respects, the stipulations, agreements, covenants and conditions of the Contract as it now exists or may be modified according to its terms, free from all liens and claims and without further cost, expense or charge to the Obligee, its officers, agents, successors or assigns, free and harmless from all suits or actions of every nature and kind which may be brought for or on account of any injury or damage, direct or indirect, arising or growing out of the doing of said work or the repair or maintenance thereof or the manner of doing the same or the neglect of the Contractor or its agents or servants or the improper performance of the Contract by the Contractor or its agents or servants or from any other cause, and shall promptly pay all persons supplying labor and materials for the performance of the Contract, then this obligation shall be void; otherwise it shall be and remain in full force and effect.

AND IT IS HEREBY STIPULATED AND AGREED that this bond shall inure to the benefit of any and all persons entitled to file claims for labor performed or materials furnished in said work so as to give any and all such persons a right of action as contemplated by Sections 103D-324(d) and 103D-324(e), Hawaii Revised Statutes.

By _____
Its _____

*ALL SIGNATURES MUST BE ACKNOWLEDGED
BY A NOTARY PUBLIC

EXHIBIT

COMBINATION PERFORMANCE AND PAYMENT BOND
(11/7/95)

KNOW ALL MEN BY THESE PRESENTS:

That we, _____
(full legal name and street address
of Contractor)

as principal, hereinafter called Contractor, and

_____,
(name and street address of bonding company)

a corporation duly licensed for the purpose of making,
guaranteeing, or becoming sole surety upon bonds or
undertakings required or authorized by the laws of the
State of Hawaii, as surety, hereinafter called the
Surety, are held and firmly bound unto _____

_____,
(State/County entity)

its successors and assigns, as Obligee, hereinafter

called Obligee, in the amount of _____

(Twice the dollar amount of contract)

DOLLARS (\$_____) (being _____
DOLLARS as performance bond and _____

DOLLARS as payment bond, each in the amount of one
hundred percent of the contract price as required by
103D-324, Haw. Rev. Stat.), lawful money of the United
States of America, for the payment of which to the said
Obligee, well and truly to be made, Contractor and
Surety bind ourselves, our heirs, executors,
administrators, successors and assigns, jointly and
severally, firmly by these presents.

WHEREAS:

The Contractor has by written agreement dated

_____ entered into a contract with Obligee for
the following Project: _____

which is hereinafter referred to as the Contract.

NOW, THEREFORE,

The condition of this obligation is such that, if Contractor shall promptly and faithfully perform the Contract in accordance with, in all respects, the stipulations, agreements, covenants and conditions of the Contract as it now exists or may be modified according to its terms, and shall deliver the Project to the Obligee, or to its successors or assigns, fully completed as in the Contract specified and free from all liens and claims and without further cost, expense or charge to the Obligee, its officers, agents, successors or assigns, free and harmless from all suits or actions of every nature and kind which may be brought for or on account of any injury or damage, direct or indirect, arising or growing out of the doing of said work or the repair or maintenance thereof or the manner of doing the same or the neglect of the Contractor or its agents or servants or the improper performance of the Contract by the Contractor or its agents or servants or from any other cause, and shall promptly pay all persons supplying labor and materials for the performance of the Contract, then this obligation shall be void; otherwise it shall be and remain in full force and effect.

AND IT IS HEREBY STIPULATED AND AGREED that no change, extension, alteration, deduction or addition, permitted by the Contract, in or to the terms of the Contract, or the plans or specifications pertaining thereto, shall in any way affect the obligation of the Surety on this bond; and the Surety does hereby waive notice of any such change, extension, alteration, deduction or addition in or to the terms of the Contract, or the plans or specifications pertaining thereto, or in or to the said Project.

AND IT IS HEREBY STIPULATED AND AGREED that suit on this bond may be brought before a court of competent jurisdiction without a jury, and that the sum or sums specified in the said Contract as liquidated damages, if any, shall be forfeited to the Obligee, its successors or assigns, in the event of a breach of any, or all, or any part of, the covenants, agreements, conditions, or stipulations contained in the Contract or in this bond in accordance with the terms thereof.

AND IT IS HEREBY STIPULATED AND AGREED that this bond shall inure to the benefit of any and all persons entitled to file claims for labor performed or materials furnished in said work so as to give any and all such persons a right of action as contemplated by Sections 103D-324(d) and 103D-324(e), Hawaii Revised Statutes.

The above-named Contractor and Surety hereby jointly and severally agree with the Obligee that every person who has furnished labor or material to the Contractor for the performance of the Contract who has not been paid in full therefor after two months from the completion and final settlement of any contract, may institute an action against the Contractor and its sureties, and have their rights and claims adjudicated in the action, and judgment rendered thereon. If the full amount of the liability of the sureties on the bond is insufficient to pay the full amount of the claims, then, after paying the full amount due the Obligee, the remainder shall be distributed pro rata among the claimants. The Obligee shall not be liable for the payment of any costs or expenses of any such suit.

The amount of this bond may be reduced in accordance with and subject to section 3-122-226, Hawaii Administrative Rules.

Signed and sealed this _____ day of _____, 199____.

Principal Seal

By _____
Its

By _____
Its

Surety Seal

By _____
Its

By _____
Its

*ALL SIGNATURES MUST BE ACKNOWLEDGED
BY A NOTARY PUBLIC

